

1 DEPARTMENT OF ENVIROMENTAL QUALITY

2 STATE OF UTAH

3

4

5 DAQ-016-06

6

7

8

9

10 The following proceedings were taken before Jason
11 Cohran, RPR, on the 6th day of April, 2006, at 168
12 North, 1950 West, Building 2, Room 101, Salt Lake City,
13 Utah, commencing at approximately 1:34 p.m.

14

15

16

17

18

19

20

21

22

23

24

25

1 AIR QUALITY BOARD APPEARANCES:

2 JOHN M. VERNATH

3 EARNEST E WESSMAN

4 NAN BUNKER

5 STEAD BURWELL

6 JERRY D. GROVER

7 DIANNE R. NIELSON

8 WAYNE M. SAMUELSON

9 DON SORENSEN

10 RICHARD W. SPROTT

11 AQB COUNSEL: FRED NELSON

12

13

14

15

16

17

18

19

20

21

22

23

24 Reported By:

25 Jason Cohran, RPR.

1 (Transcript beginning with item VII: In the Matter of
2 Sevier Power Company Power Plant, DAQEAN2529001-04,
3 1:34 p.m.)

4 MR. VERNATH: We'll now take up the Sevier
5 Power. I think this will be a good time to start the
6 transcript.

7 What we'll do here, Fred Nelson will come up and
8 take a place beside me since he's the counsel to the
9 board on this. And what I want to say here at the
10 start, is I'm going to have Mr. Nelson make some
11 introductory comments about our options and procedures
12 and how these matters have been handled. Then we'll
13 take a couple a minutes to just resolve among ourselves
14 based on (inaudible) some procedural issues that are to
15 be handled today.

16 Tentatively, what I expect we'll do is deal with
17 some of the motions, and then we'll define the scope of
18 the hearing. At that point, we can recess the Sevier
19 Power matter and allow the parties to negotiate among
20 themselves on some issues and that will have to be
21 resolved at the prehearing conference. During that
22 time, we can take the information items, and that will
23 give them about 30 minutes to discuss this among
24 themselves, at which time they can come back and we can
25 resume Sevier Power with having the prehearing

1 conference. I think that will flow and be efficient
2 with everyone's time.

3 So, Mr. Nelson.

4 MR. NELSON: Before all of that happens,
5 the initial thing that needs to be decided is a request
6 from the Sierra Club. As you recall, in this matter
7 the Sierra Club petitioned to intervene. The board
8 denied that petition. They have appealed that to --
9 It initially went to the appellant court. The Supreme
10 Court then took jurisdiction over that matter.

11 The Sierra Club requested that the board delay
12 hearing this Sevier Power matter until the courts had
13 reviewed it. The board denied that request. They have
14 submitted a letter to the board, and it's under Tab A,
15 of the information that was given to you reviewing that
16 request. So that is the initial determination that the
17 board needs to make there before we go any further,
18 because if the board grants its request, of course, the
19 rest of the matters today would not go forward.

20 So, I believe, it would be appropriate to hear
21 briefly from the Sierra Club and whoever wants to
22 respond and then the board needs to make a decision on
23 that issue.

24 MR. VERNANTH: Okay. Gerol (phonetic)
25 Walker.

1 MS. WALKER: Good afternoon. I'm Gerol
2 Walker on behalf of the Sierra Club and the Grand
3 Canyon Trust.

4 Fred gave a nice background for the renewal of
5 our request for a stay. And we made that request
6 because the situation here has changed a little bit.
7 One of the first changes is that our appeal of your
8 denial of our request to adjudicate our request for
9 agency action has been heard by the Supreme Court, and,
10 therefore, you can assume that a decision will come
11 fairly quickly. And because it is the Utah Supreme
12 Court that has heard it, after that, there will be no
13 opportunity for appeals to any Utah court. So, for the
14 purposes of Utah law, the issues will be final.
15 Therefore, we don't look forward to anymore appeals,
16 and, presumably, that decision will occur fairly
17 quickly. When is anybody's guess, but fairly quickly,
18 so that if you are concerned about the delay that would
19 occur if you granted our stay, you would be somewhat
20 content to know that that delay would be shorter now
21 that the Supreme Court has heard our appeal.

22 And the second thing that has happened is that
23 issues have unfolded such that the basis for our
24 request for a stay is becoming that much more apparent.
25 And I just give as an example, as I did in the letter,

1 the issue raised by Sevier Citizens relative to IGCC
2 and BACT. As you may recall, Sierra Club raised that
3 same issue. One of the reasons we asked for a stay in
4 the first place is because we felt that if you were to
5 rule on that issue without us being able to participate
6 as a full party, we would be harmed.

7 As we said in the letter, we as an Amicus, we
8 can't participate at the same level as we would if we
9 were full party. And, most importantly, we couldn't
10 and can't submit evidence. The other thing we couldn't
11 do is appeal a decision, and those are very critical
12 from the perspective of protecting our interests. So
13 we said that at that time, and we're saying it again,
14 that as an Amicus, we can't protect our interests, and,
15 therefore, as we said in the letter, decided not to
16 take you up on your offer to allow us to participate as
17 Amicus because to do so would not be in our interests.
18 So that's the first reason we asked for a stay, and I
19 think it is that much more apparent that that request
20 is valid right now.

21 And the second thing is, is that we're not bound.
22 As we say in the letter, we're not bound by your
23 decision relative to IGCC in the Sevier County
24 proceeding. And, therefore, if we're successful in our
25 appeal of your denial of our standing, and, therefore,

1 we're entitled to a full hearing, you'll have to hear
2 the issues again. So we state in our letter that that
3 would be contrary to efficiency. And that may be based
4 on the sort of a graphic example in front of you of the
5 possibility that you'll have to hear issues twice, that
6 you may want to consider a stay. So that's why we
7 wrote the letter and asked for you to reconsider, just
8 the advant of those new events.

9 So Mr. Vernath, do you want me to answer
10 questions now, if there are any, or let the other
11 parties talk?

12 MR. VERNATH: Are there any questions from
13 the board, or do you want to hear from the Executive
14 Secretary's attorney?

15 Christian, why don't you stick up close to the
16 front.

17 MR. STEVENS: Christian Stevens, from the
18 attorney general's office on behalf of the Executive
19 Secretary.

20 Mr. Chairman, members of the board, thanks for an
21 opportunity to respond to Sierra Club's letter. As Mr.
22 Nelson pointed out, last year, the board made a
23 decision to deny standing to the Sierra Club which we
24 quickly renewed in front of the court of appeals which
25 also denied it. The decision to deny standing to the

1 Sierra Club hasn't been overturned, so the
2 circumstances now as far as if the board is concerned
3 are no different than they were almost exactly a year
4 ago when the board denied that request. Sierra Club,
5 itself, says in its letter that its interest are not
6 the same as the Sevier County Citizens. However, they
7 have pointed out this one question's relation to how
8 the best available control technology issue or, the new
9 regulation, is interpreted by the board or by the
10 Executive Secretary.

11 Sierra Club had an opportunity to brief this
12 issue for today, but declined to do it. We don't know,
13 as Ms. Walker pointed out, when the Utah Supreme Court
14 will make a decision on their standing. But, at this
15 point, the circumstances have not changed enough to
16 justify a different conclusion as far as whether Sierra
17 Club deserves to stay. If they don't wish to
18 participate now, whatever consequences are attuned to
19 that are strictly their choice. But from the Executive
20 Secretary's perspective, there is not a sufficient
21 change in the circumstances now to justify a different
22 decision when the evidence before the board has not
23 changed.

24 MR. VERNATH: Is anyone here representing
25 Sevier Power?

1 MR. TAYLOR: Yes.

2 MR. VERNATH: I'm Bruce Taylor. I'm with
3 Sevier Power Company. Fred Finlinson is generally
4 here. I can only assume he's tied up in the traffic.

5 MR. VERNATH: There is a written document,
6 I believe -- No, there was not. So you don't have any
7 comments on the request for a stay?

8 MR. TAYLOR: Obviously, we're against it,
9 but --

10 MR. VERNATH: Okay. Thank you very much.
11 And I believe Pacificorp has submitted a letter on
12 behalf of that issue.

13 MR. JENKINS: Good afternoon. My name is
14 Mike Jenkins. I'm assistant general counsel for
15 Pacificorp.

16 I actually didn't intend to speak to this issue
17 at all except for the fact that Sierra Club's counsel
18 chose to use the very issue that Pacificorp is
19 interested in as her example as to why a stay should be
20 granted. So I would like to take just a minute to talk
21 about that issue in the context of granting a stay.

22 First of all, Pacificorp's position -- and I
23 think we'll have a chance to argue this a little bit
24 later -- is that the issue of IGCC is backed is purely
25 a legal issue. It's not a factual issue. It's

1 something that the board can decide by looking at the
2 law, looking at the permit in this particular
3 circumstance, and applying the law to these
4 circumstances. It is not something that the Sierra
5 Club, or anybody, needs to submit evidence on as Ms.
6 Walker has suggested that her clients would like to do.
7 It is not something that witnesses need to be
8 cross-examined on. It is purely a legal matter, which
9 from our perspective, can be decided today based on the
10 written proceedings that have been submitted. Whether
11 or not the Sierra Club can initiate an appeal, appeal,
12 certainly, and the Amicus status, our understanding is
13 that we could participate in the appeal should any of
14 the parties choose to do that. And so it is not like
15 Ms. Walker's clients are completely out in the night on
16 that issue.

17 She also mentioned that they will be harmed by
18 not being able to participate in full-party status,
19 and, in the next breath said the Sierra Club wouldn't
20 be bound by this decision anyway even if it was
21 rendered against her clients. Of course, Pacificorp's
22 position is, potentially, it would be binding on not
23 just her clients, but also on Pacificorp, which is the
24 reason why we're hear arguing the case.

25 And this is a very important issue to us and

1 that's the reason why we took the board's permission to
2 participate in Amicus status, and we've briefed that
3 particular issue very thoroughly as have all of the
4 other parties, except the clients Ms. Walker
5 represents.

6 We believe it's properly pending before the board
7 right now, and should be decided, and can be decided,
8 on the pleadings as recommended by the Executive
9 Secretary and that it should not be a reason to grant a
10 stay as we've requested by the Sierra Club in the Grand
11 Canyon Trust. Thank you.

12 MR. VERNATH: Do any of the board members
13 have any questions for any of the counsel?

14 MS. WALKER: May I have the opportunity to
15 reply?

16 MR. VERNATH: If we have no questions, I
17 guess you can do your rebuttal now.

18 MS. WALKER: I just wanted to respond
19 briefly to Pacificorp.

20 First of all, their suggestion that the issue
21 will be decided without evidence seems to be contrary
22 to the submission of DWQ which includes evidence. Now,
23 therefore, when we state that we would present evidence
24 to at least compare with the evidence that DWQ has
25 submitted, that's a very valid point. I mean to say

1 that the issue will be addressed legally when, first of
2 all, evidence hasn't been submitted, and secondly, when
3 we say that we would submit evidence, it seems a bit
4 disingenuous. Secondly, this idea that by saying that
5 we can't protect our interests adequately somehow
6 conflicts with the idea that we're not bound by your
7 ruling idea isn't valid and this is because it's clear
8 that without the ability to submit evidence and without
9 the ability to appeal the decision -- Now, of course,
10 PacifiCorp says, if someone else appealed, we could
11 participate. Well, that's one thing, but what if no
12 one else appeals? There is no proceeding for us to
13 participate in. That is a pretty significant issue if
14 no one else appeals.

15 And, secondly, back to reiteration of my point
16 that we would submit evidence and evidence has been
17 submitted relative to IGCC, and you'll find that in
18 your packet tab H at the very end there. It's an EPA
19 letter.

20 So, I just want to make that point that we felt
21 as though we couldn't participate -- We appreciate the
22 offer of Amicus. We feel like we can't protect our
23 interests in that capacity. We want to reiterate that
24 we're not bound, or it certainly is our position that
25 we are not bound, by any decisions you make relative to

1 IGCC and BACT in this proceeding, and, therefore, just
2 consider the possibility that you may want to wait
3 until you can resolve the issue presumably with an
4 understanding of what the Utah Supreme Court is going
5 to say. Thank you.

6 MS. NIELSON: I guess after replies, I'd
7 like to ask a question, but I can wait procedurally.

8 MR. VERNATH: Christian Stevens.

9 MR. STEVENS: Christian Stevens on behalf
10 of the Executive Secretary. I just want to point out
11 here, the letter says they submitted withdrawing
12 themselves from Amicus status in this matter, they said
13 our interests are not the same as those of Sevier
14 County citizens, but they also said, please don't have
15 a hearing because our interests are going to be
16 harmed. Which way do they want it? They can't have it
17 both ways.

18 MR. VERNATH: Ms. Walker, I believe you
19 referred to that as a letter from DWQ. And I think it
20 is DAQ.

21 MS. WALKER: Sorry. I apologize.

22 MR. VERNATH: So it is from Air Quality?

23 MS. WALKER: We would hope so.

24 MR. VERNATH: Dianne?

25 MS. NIELSON: I guess I had a question for

1 Ms. Walker first, but also to the other parties. How
2 would Sierra Club be harmed if ultimately the Supreme
3 Court decided to grant, or rule, in favor of your
4 position and assuming that we had proceeded with the
5 hearing? What would be the harm to Sierra Club at that
6 point?

7 MS. WALKER: Well, as we said when we
8 originally requested a stay, there is a suggestion that
9 the board could be presented with a considerable amount
10 of argument relative to IGCC. And even though Sierra
11 Club was granted a hearing, the opportunity to present
12 evidence and whatnot given they have standing, to a
13 certain extent, the board would have already made up
14 it's mind relative to that issue and that it would be
15 harder to influence them, or you, with new information
16 and that would be the harm.

17 But I would also like to suggest that a lot of
18 our argument was based on this efficiency notion. Now,
19 of course, the efficiency notion is strictly up to
20 you. That's not really our business. I'm mean, we
21 make the argument so that you can consider it when
22 you're deliberating, but it's really an issue that
23 concerns the board and Utah tax payers, generally, and
24 things like that. But the harm we characterized was
25 one of essentially of the board making a decision on

1 the basis of incomplete information because we were not
2 able to give the information and the arguments that we
3 would make, and, therefore, getting wedded to a
4 particular view with regard to that issue.

5 MS. NIELSON: And then I just would be
6 interested if any of the other parties wanted to
7 address that question in terms of how they would be
8 harmed or wouldn't be harmed if we proceeded.

9 MR. STEVENS: So the question is the
10 identical one from the perspective Executive Secretary?

11 MS. NIELSON: How would the Executive
12 Secretary be harmed if we were to proceed at this point
13 or not proceed at this point depending on the ruling of
14 the Supreme Court?

15 MR. STEVENS: Well, with respect to that, I
16 think at this point, it is clear that the parties are
17 prepared for a hearing next month. All schedules have
18 spent a considerable amount of time factoring in this
19 time as preparing for a hearing. We believe it is time
20 to move forward. And, I guess, this dovetails with how
21 I was going to respond, which is, the issues that
22 Sierra Club raised in it's own request for agency
23 action, and those are the same ones they were bringing
24 before the board now. Those issues haven't changed at
25 all. And a year ago, the board was not persuaded that

1 it rose to the level that would merit a stay. That
2 circumstance has not changed at all. It's identical.
3 So, at this point, we're ready to move on. We feel
4 that a stay would be appropriate.

5 Does that answer your question?

6 Oh, if I might add one last thing. With respect
7 to this issue of whether they would be bound by one
8 decision or another, they say, of course, that they're
9 going to be harmed, but then they say that they won't
10 be bound by it. But, again, these are the same issues
11 they raised before. And, if the Utah Supreme Court
12 determines that they have standing and are reinstated
13 to pursue their request for agency action, we would
14 have another hearing. But that is speculative at this
15 point. We have no idea how the court is going to come
16 down and we should move forward at this point.

17 MS. NIELSON: Mr. Chairman, I think the
18 cover on the cord there is creating more of a risk.
19 And I wondered if rather than having people trip over
20 it, we might just remove it.

21 MR. VERNATH: Mr. Jenkins.

22 MR. JENKINS: Ms. Walker characterized the
23 harm her clients would suffer as essentially the board
24 would have already made up it's mind and it would be
25 harder to influence the board the next time. That is

1 precisely the reason why Pacificorp accepted the
2 board's offer to participate as an Amicus status. That
3 is exactly why we have gone to the time and trouble and
4 resources and expense to submit written briefs and to
5 appear in these hearings. That is the reason why we're
6 here. And to have her suggest that her clients would
7 be harmed in the exact same way that my client would be
8 harmed, and then in the next breath say she's not going
9 to participate and they're not going to participate,
10 makes a mockery of the proceeding. This very
11 proceeding is for the purpose of deciding the issues
12 that have been raised, and this is the one issue that
13 Pacificorp is concerned about. And that's why we're
14 here, and it should not be the basis, or her client's
15 lack of participation should not be the basis, for now
16 putting the whole proceeding off because they might be
17 harmed in a way that their participate would
18 alleviate. They chose not to participate. You invited
19 them to participate, and they chose not to. The board
20 should not grant a stay based on the circumstances
21 before it right now.

22 And might I add that, incidentally, this request
23 for a stay if it is characterized as a motion, from one
24 perspective could be viewed as a dispositive motion.
25 The board set a specific date by which dispositive

1 motions should be filed. The Sierra Club and the Grand
2 Canyon Trust did not meet that date. I can't recall
3 the date right off the top of my head, but they did not
4 meet the date with their letter. This group knows how
5 to file pleadings. It knows how to file pleadings on
6 time. It chose, instead, to file a letter past the
7 motion deadline and now is trying to rely on that to
8 delay this whole proceeding when all the parties are
9 ready to deal, not with just this one issue, but 13
10 other issues as well, and we urge the board not to
11 grant the stay at this time.

12 MR. VERNATH: I see Mr. Finlinson has
13 arrived. Would you like to say something?

14 MR. FINLINSON: My name is Fred Finlinson.
15 I represent Sevier Power Company. Our position is very
16 consistent with the Division of Air Quality. This
17 board has made a determination that was requested by
18 the Sevier Power Company that they would not stay their
19 actions, and that was made after you determined that
20 they did not have standing to pursue. They have
21 participated in the claim, or the adjudication, at the
22 circuit court and the court of appeals and then to the
23 supreme court, but they have not been participating in
24 the process that we have been going through with
25 discovery and everything else. And so now for them to

1 the division, when we we've argued that position in the
2 briefing, the position has been that there are two
3 separate issues or complaints or requests for a
4 review. Some of them are consistent. Some of them are
5 not. If the supreme court were to remand that decision
6 back to you to have them, we would expect to go through
7 a trial process with them. We've evaluated that
8 option. We think it is important to deal with the
9 issue that is now in front of you which is the issue
10 raised by the Sevier Citizens and get resolution on
11 that one. And then, if, in fact, there is a review or
12 it is remanded and ask you to proceed, or if they're
13 granted standing, we will proceed to deal with the
14 resolution of their concerns.

15 MR. VERNATH: Before we get to any motions
16 -- Earnest.

17 MR. WESSMAN: Mr. Chairman of the Board,
18 because of my employment with Pacificorp, I need to
19 recuse myself from voting regarding this issue
20 (inaudible) in all these aspects.

21 MR. VERNATH: Okay. And, in my case, about
22 a year ago, I filed a fairly detailed disclosure of
23 potential conflicts of interests. The only thing that
24 has changed is I did allow a recruiting firm to forward
25 my resume to a company that (inaudible) IGCC

1 technology, but I don't think they can pay me enough
2 money to move out of state. But I disclose that now.

3 We've heard from all the parties. We have a
4 request here for a stay.

5 MR. SORENSON: I have a question for Mr.
6 Nelson. Is there any legal advice that we've not
7 already heard (inaudible) in making this decision?

8 MR. NELSON: I think what's been presented
9 is defined with the issues.

10 MR. HORROCKS: Mr. Chairman, I'd like to
11 make a motion. I'd like to move that the Sierra Club's
12 request for stay be denied.

13 MS. NIELSON: Second.

14 MR. VERNATH: Okay. Moved and seconded by
15 Nan. Is there any further discussion of this matter?

16 With no interest in discussion, all in favor?

17 Opposed?

18 All right. I guess the motion is denied. The
19 motion is accepted and the request for stay is denied.

20 MR. NELSON: If I could take just a minute
21 now and describe -- You've received an extensive set of
22 documents, and I would like to put them in context to
23 describe to the board what your options are today in
24 considering those. You have before you two sets of
25 documents from Sevier Citizens that is an initial

1 request for agency action and then a further filing
2 that details the specific points that they have raised.
3 And there are 14 different points they have been raised
4 with respect to the inadequacy, the alleged inadequacy,
5 of the issuance of a permit and approval over to Sevier
6 Power. That request for agency action is set for
7 hearing on May 10th.

8 Part of the administrative process is that if a
9 party believes that issues do not require evidence to
10 be taken, that there can be a decision made simply on
11 the basis of the rules, the law, that no evidence is
12 required to be taken on a particular issue. They can
13 file a dispositive motion, what is called a
14 "Dispositive Motion." And the Executive Secretary has
15 filed a dispositive motion with respect to 9 of the 14
16 issues that have been raised by Sevier Power, and those
17 are listed in the document.

18 The board set today as a day when dispositive
19 motions could be heard. It is not required that they
20 be heard. It is not required that the board make a
21 decision at this point, but if the board concludes that
22 there is no reason for holding a hearing and receiving
23 evidence on those issues that you can decide those
24 issues prehearing, it then ends up consolidating and
25 limiting the scope of the hearing. And you have -- You

1 shorten the time needed theoretically for the hearing.
2 So you have the option today of hearing those specific
3 points, each of the nine issues raised by the Executive
4 Secretary and deciding those if you conclude that you
5 do not need to hear evidence on those issues, or you
6 could defer that matter and consider those finally at
7 the hearing.

8 There is a second part of the process that you
9 will need to decide today. And that's -- It's referred
10 to, just very briefly, as a prehearing conference. But
11 I want to mention what that entails so you will have
12 before you what is on the agenda today. At this
13 prehearing conference, you will need to decide the
14 scope, what will be done at the May 10th hearing.
15 Obviously, if you rule on some of the issues, and that
16 ruling is in favor of the Executive Secretary and
17 Sevier Power, then those issues wouldn't be part of the
18 May 10th hearing.

19 You also need to decide the schedule for how you
20 want to make a decision, and there are pretty much two
21 options there. You can, at the May 10th hearing, take
22 all of the evidence, hear final argument, make a
23 decision at the end of the May 10th hearing, and then
24 refer it to me, and I would write up the decision that
25 the board makes, and, at the June meeting, that would

1 be brought back to you for final approval on deciding
2 the issues.

3 A second process could be used, and that is where
4 you use the May 10th hearing to receive the evidence,
5 then you would ask the parties to present, within ten
6 days of that hearing, a post-hearing brief which
7 summarizes for you what they believe was presented and
8 how they believe it should be decided and present to
9 you a proposed findings of fact and conclusions of law
10 that they would like for to you enter, and then you
11 would rule on that in the June meeting. So those are
12 two options you have to consider.

13 You will also need to decide the order of
14 presentation, how that will be handled. You will also
15 need to decide a time allocation for each of the
16 parties, how much time you would like to grant them for
17 opening statements, how much time you will give each of
18 the parties to present evidence. There is a limited
19 time between 9:00 o'clock in the morning and 5:00
20 o'clock at night, which is, I believe, the time that is
21 set out for the hearing to be held, and you will need
22 to determine allocations of time for each of the
23 parties on their presentations of evidence.

24 That is the issues, then, that are before the
25 board, so the first question you need to decide is

1 whether you would like to go forward today and rule on
2 the dispositive motions that have been presented as was
3 agreed to in the scheduling order presented by
4 Executive Secretary to the board.

5 Is there any questions with respect --

6 MR. GROVER: I just have one question on
7 the order. Because, item C is ruling on they whether
8 they accepted ruling on whether they (inaudible) to
9 first request for agency action. It seems to me since
10 there is a duplication there between that and the
11 second one whether we should determine that before we
12 go to this issue of the specific points. Does that
13 make sense?

14 MR. NELSON: You mean items -- You're
15 talking about the motion to dismiss?

16 MR. GROVER: Well, not the motion to
17 dismiss, the November 1st 2004 request for agency
18 action. The B is based on the March 16th, 2005 request
19 for agency action. Since there is some duplication
20 there --

21 MR. NELSON: I lump those two. In my
22 discussion, I kind of lump those two in together. If
23 you recall --

24 MR. GROVER: So the presumption is, if we
25 acted on this, it would be effective against the first

1 one?

2 MR. NELSON: It may, yes.

3 MR. GROVER: For or against, whichever one
4 it was.

5 MR. NELSON: Right. It would affect the
6 prehearing conference because it would affect the
7 allocation of time.

8 As you recall, Sevier Citizens filed an initial
9 kind of summary pleading, and it was objected to by the
10 parties, and they filed a more extensive pleading that
11 defined what their issues were and more specifically
12 defined their standing. The board granted standing to
13 Sevier Citizens. And my understanding is the Executive
14 Secretary is just saying, well, that first one doesn't
15 need to stay in place because they've substituted with
16 their more specific definition of the issues, and that
17 is something that Sevier Citizens can address as part
18 of the whole process. But those two issues are kind of
19 part of the same thing.

20 MR. GROVER: No, I'm saying, if we make a
21 2005 RFA, is that going to automatically apply to the
22 2004 RFA? The points are different is what I'm saying.
23 You've got issue by issue.

24 MR. NELSON: My understanding -- and Sevier
25 Citizens maybe needs to clarify this -- my

1 understanding is that their later filing was simply a
2 more specific definition of what they had initially
3 filed. And I see some heads nodding, "Yes."

4 MR. GROVER: I don't know if they would
5 object to the items -- I'm just wondering if we're
6 going to create a fugility for ourselves by handling
7 one and then handling another in a different fashion;
8 again, not predicting will happen.

9 MR. NELSON: Even if the board agreed with
10 the Executive Secretary on all 9 issues, there are
11 still five issues that have to go to hearing in any
12 event. Whether there are any other issues relating to
13 that first pleading, I'm not aware of it. Because, I
14 think that first pleading was simply a summary, and the
15 later pleading is a specific definition of their
16 points. Again, I'm seeing some nodding.

17 MR. VERNATH: So I think, right now, we
18 have -- if we want to, we should deal with those two
19 items, the Executive Secretary's motion to dismiss the
20 first pleading, and the Executive Secretary's motion
21 for a judgment on the nine points.

22 MR. NELSON: On the nine issues, right.

23 MR. VERNATH: And, then, after we have
24 taken care of those issues, that will have defined what
25 will be in the scope of the hearing, and then we can

1 talk about the prehearing conference.

2 MR. GROVER: Procedural question for the
3 attorney. I'm not an attorney. In my capacity as
4 (inaudible) official, I've been sued hundreds of times,
5 so I'm a little familiar with some of the procedures.
6 But, on these types of motions, there is not really
7 oral argument, is there, or is this usually handled --

8 MR. NELSON: It's up to the board. If you
9 want to hear a summary --

10 MR. GROVER: I mean, in a normal judicial,
11 maybe, the judges would look it over and rule or --

12 MR. NELSON: It depends. It's up to the
13 judges to whether they want to hear a discussion. And,
14 in this particular case where you have 9 issues and
15 they're fairly complicated, it might be worthwhile for
16 the board, rather than just rely on the written, that
17 you hear some summary discussion about those issues,
18 unless -- It is up to you.

19 MR. GROVER: And I just wondered -- And if
20 we do, if there are time limits, or there is any
21 procedures?

22 MR. NELSON: That is up to the board. You
23 can set those.

24 MR. VERNATH: I guess we received today two
25 documents, a board packet. These are from the

1 Executive Secretary, I believe. So this is in addition
2 to, or supplemental information --

3 MR. MCCONKIE: Yeah, those are handouts for
4 purposes of oral argument.

5 MR. VERNATH: Okay. Well, I guess the
6 question is, do we want to hear oral arguments on the
7 questions of law on these two points?

8 MS. NIELSON: Mr. Chairman, given this is a
9 rather complex issue and the opportunity to hear some
10 part of those concerns that were raised and the
11 response now and the requested motion from the
12 Executive Secretary and either to determine that we
13 would not act as the Executive Secretary requested and
14 hear them then at the proceeding in May, or that we
15 would hear enough information today to make a decision,
16 seems to me to be valuable in sorting through this
17 issue, so I'd recommend that we proceed today and allow
18 some time for the Executive Secretary's representative
19 to summarize the issues and some opportunity for the
20 Sevier Power Citizens to present information that they
21 have with regard to that motion.

22 MR. VERNATH: Okay. With the consent of
23 the board, we'll hear the oral arguments on these two
24 motions. As Mr. Grover pointed out, they are closely
25 related. You might address both them as each of you

1 come up in series, and then deal with them as two
2 separate votes, but we can discuss them in the totality
3 as you present it rather than having everyone come up
4 twice. Would that be all right?

5 MS. NIELSON: Yes.

6 MR. VERNATH: All right. Well, then
7 Christian Stevens, we'll recognize you to present on
8 the Executive Secretary's motion.

9 MS. NIELSON: Could we clarify a time
10 frame?

11 MR. VERNATH: Yes. What would be a
12 reasonable time frame for each party? Do you have a
13 suggestion of how long?

14 MR. MCCONKIE: Yeah, I would think 20
15 minutes, and then if we -- Well, if we could have a
16 total of 30 minutes and then reserve maybe 10 minutes
17 for rebuttal. I don't know whether we would use all
18 that time, but I can't imagine that we would take more
19 time than that.

20 MR. VERNATH: And then we would allow
21 Sevier Citizens equal time. And, of course, if Sevier
22 Power wanted to talk, they would be able to address
23 that as well.

24 MR. STEVENS: May I first ask a question?
25 Are we addressing the motion to dismiss first or just

1 --

2 MR. VERNATH: As each party comes up, could
3 you address in the 20 minutes both of those in
4 whichever order you want? Because they're closely
5 related, I think that would be more efficient.

6 MR. STEVENS: Okay. We'll go ahead and
7 just start with the motion to dismiss. Perhaps a good
8 preliminary question is, is the motion any longer
9 contested on the first request for agency action? I
10 mean, we don't need to have anymore discussion if there
11 is no opposition. There was in the filing, but now
12 that it has been explained, perhaps there is no longer
13 an opposition.

14 MR. VERNATH: Could you answer that, Mr.
15 Kennon?

16 MR. KENNON: Yeah, we oppose it. We want,
17 just like I put in my reply. They're one document.
18 That's all, just like Mr. Nelson explained.

19 MR. VERNATH: We'll, then we'll allow you
20 time to explain that.

21 MR. STEVENS: We consider this really just
22 a matter of clarification and housekeeping. We filed a
23 motion to dismiss to the November 1st, 2004 request for
24 agency action because we believe that the four claims
25 that were outlined there failed to state a claim on

1 which relief could be granted. We were not able to
2 make enough sense out of those allegations to be able
3 to fashion a response. So, as permitted by law, we
4 filed a motion to dismiss which specifically said that
5 if Sevier County Citizens wished to refile something
6 else that further articulated what their specific
7 claims were, we wouldn't be opposed to that.

8 Before the board made a decision on our motion to
9 dismiss, Sevier County Citizens submitted a second
10 document. It was not referred to as a request for
11 agency action, although, it did say they have 14 new
12 claims that were far more specific than the ones in the
13 previous document. It has been our position that that
14 second filing superseded and replaced the other more
15 generalized allegations. We've never changed our
16 position that those first four failed to state a legal
17 claim. And we didn't oppose standing on those 14,
18 because we felt those represented what the their true
19 claims were.

20 So what we're asking the board to do is to
21 clarify any lingering ambiguity by dismissing those
22 previous four claims and limiting the scope of any
23 hearing on this matter to the 14 that were raised March
24 16, 2005.

25 MR. MCCONKIE: I don't have anything to add

1 to that.

2 MR. NELSON: We're not going to deal with
3 these as individual motions.

4 MR. MCCONKIE: Okay.

5 MR. STEVENS: I just want to add that we
6 feel that that can be done by an order of the board.

7 MR. MCCONKIE: I'm Paul McConkie. I
8 represent the Executive Secretary. I'm with the
9 attorneys general's office.

10 And, Members of the Board, I appreciate the
11 opportunity to be hear to address you today.

12 I know that you have had an opportunity to read
13 the motions that have been filed, and so I don't want
14 to spend a lot of time just reiterating what's in the
15 motion. What I would like to do is use this as an
16 opportunity to summarize and answer questions that you
17 may have, and just hit some key points.

18 What I would like to begin with is to start out
19 with the standard of review, because I think that's
20 really what's going to guide us through this process.
21 If you will, look at the handout that has gone out. On
22 the first page, it sets forth the standard of review
23 for judgment on the pleadings. The judgment on the
24 pleadings is found in The Utah Rules of Civil
25 Procedures, Rule 12 (c). "And the motion for judgment

1 on the pleadings will be governed by the same standard
2 as a rule 12(b)6, motion to dismiss, for failure to
3 state a claim. And it is proper only where it appears
4 the claimant would not be entitled to relief under the
5 facts alleged or under any stated facts they could
6 prove to support their claim."

7 So, in other words, if this claim were to go to
8 trial and the claimant were to put on witnesses, that
9 testimony, or that evidence which is offered, would be
10 of no assistance to the trier of fact in making a
11 decision. And as we go through each claim, I think
12 that's something important to keep in mind. I think
13 that's kind of a Litmus test as we consider each claim.
14 We will have to apply that to the standard of review.

15 "In addition, the moving party must clearly
16 establish that no material issue of fact remains to be
17 resolved and that he's entitled to judgement as a
18 matter of law." So those two go hand in hand. In this
19 case, the Executive Secretary is the moving party, and
20 so that is our burden to establish that there is not a
21 material issue of fact that remains to be resolved.

22 I think what is important right now would
23 probably be to go to the Statement of Undisputed Facts.
24 And if you would, turn to Tab H in your materials, in
25 the Executive Secretary's Motion For Judgment on the

1 pleadings, on page 9, pages 9 through 11. It sets
2 forth the Statement of Undisputed Facts. And you'll
3 notice, as you go through each one of these facts, that
4 these facts are not based upon the arguments that the
5 parties have made with respect to the claims. These
6 are essentially facts that were taken out of the
7 request for agency action. And I can't see -- perhaps
8 Sevier County Citizens will have an opportunity to
9 correct me on this if I'm wrong -- but as I go through
10 these, I can't see where there's any of these facts
11 that they would dispute.

12 In their response to our motion for judgment on
13 the pleadings, they did state that they did not agree
14 with the Statement of Undisputed facts and that there
15 were a lot of facts that were disputed. But what they
16 did is just -- Then they started getting into the
17 arguments and they treated those as disputed facts.
18 And we agree that there are disagreements when it gets
19 to the arguments and what was required under the PSD
20 requirements. But that is a separate issue than the
21 Statement of Undisputed facts in our motion.

22 If you look at Number 3 in our Statement of
23 Undisputed facts, it basically sets forth the
24 requirements. And this was taken right out of the
25 request for agency action. And so for a PSD permit,

1 there are four basic requirements. There is the best
2 available control technology requirement, there is the
3 PSD class one and two increment consumption
4 requirement, there is a National Ambient Air Quality
5 Standard Analysis, and then there is the additional
6 impact analysis.

7 It also sets forth -- the Statement of Undisputed
8 facts sets forth -- the rules that are applicable in
9 this permitting process. There is no dispute that it
10 is a news source review case, and that the PSD
11 requirements apply. There is also no dispute over the
12 rules, the PSD rules, which govern this permitting
13 process. And I think that's key to what we're talking
14 about here today is, what do the rules require, and
15 whether the claims, and any evidence that could be
16 submitted, changes that facts and would be helpful to
17 the fact finder.

18 I think what I would like to do is -- I think the
19 easiest way to go through this would be to go through
20 it claim by claim. In your handout, where the first
21 page is Claim Number 1, and then it has "Conclusion of
22 Law," underlined underneath that, essentially what that
23 is, it's a proposed conclusion of law that the
24 Executive Secretary would propose would be appropriate
25 under our motion. And we just included that as

1 something that may be helpful to the board to
2 understand more of what we're talking about here and
3 what we're asking for. Also attached to each claim is
4 the applicable PSD rules or other law which, you know,
5 which is applicable.

6 So what I'm going to do is just go through each
7 claim. And I think it is important to look at the
8 claim of Sevier County Citizens, look at the wording of
9 the claim so we see exactly what they're asking for and
10 what their allegations are, and then we can apply that
11 to the standard. We look at Claim Number 1, it says,
12 "UDAQ failed to evaluate the combined emissions of the
13 three proposed coal-fire power plants currently under
14 application in the State of Utah and the effect it
15 would have upon the nearby parks."

16 So the first question would be to go to the
17 applicable rule. What does the rule require? The
18 applicable rule is R307-405-6, subparagraph 2.
19 Then, as we look at the rule the question is, is the
20 Executive Secretary required to evaluate emissions from
21 sources that are not yet approved? The rule
22 specifically states "Approved sources."

23 One of the things that Sevier County Citizens
24 responds to that is they say, "Well, okay, maybe
25 they're not approved sources, but they should be

1 included in the definition of growth." As you look
2 further down that rule, it states on the last line of
3 subparagraph 2, it states "And to the extent
4 practicable, the cumulative effect on air quality of
5 all sources and growth in the effected area."

6 So I think what they're trying to say is, okay,
7 let's say -- One of the plans I think that comes up is
8 the Hunter 4 Plan. Which I don't think there is any
9 dispute that that is not an approved plan. It hasn't
10 gone through the permitting process and hasn't been
11 approved by the Executive Secretary. So what Sevier
12 Citizens would argue is that, "Well, the Hunter 4 Plan
13 would be included under that definition of growth."
14 But I think, as you read the rule -- You know, that
15 would be an incongruous reading of the rule to apply
16 the term "growth" to include unapproved sources. If
17 you did that, then it just wouldn't make sense. Why
18 would they say, "This applies to approved sources," and
19 then, "Well, okay, it might apply to unapproved sources
20 under some definition of growth." And so it's our
21 position that that's just not a -- It would be a
22 congruous reading of that particular rule.

23 And so on Claim Number 1, because -- As a matter
24 of law, because 30740562 does not require the
25 evaluation of unapproved sources, then, on this

1 particular claim, the Executive Secretary is entitled
2 to judgment as a matter of law. It doesn't matter what
3 evidence that the Sevier Citizens might put on at
4 trial. They can put on all the evidence they want with
5 regard to the unapproved sources, but if when all is
6 said and done, the board, says, "Well that's fine, but
7 the rule doesn't require evaluation of unapproved
8 sources," then it has been a waist of time. And I
9 think that's really what the law recognizes is you
10 should only take issues to trial that are disputed. If
11 there is nothing the fact finder can do for the
12 claimant, then it doesn't make sense for it to go to
13 trial.

14 MR. VERNATH: I think this is very helpful,
15 but you're 15 minutes into your 20 minutes of time, and
16 we're on claim 1 of 9. We really need to address
17 procedural amounts of time. And, also, if we're going
18 to take questions -- I can take notes, and then we can
19 take questions on all of them, but I'm just noticing --
20 Will you need more time than 20 minutes?

21 MR. MCCONKIE: We may need more time. I
22 didn't realize that I was taking that much time. I'll
23 try to move through it a little bit quicker. It's
24 probably not necessary to go into this much detail.

25 MR. VERNATH: I think in this particular

1 case, I want to make sure myself that we understand
2 what we're dealing with. The facts like Hunter 4 is
3 not approved and so forth, nobody is disputing that.
4 So the question before the board today is a question of
5 law. And, specifically, because this is what the
6 parties agreed, the question of law is what does that
7 second clause mean, that "The Executive Secretary to
8 the extent practicable shall consider the acknowledge
9 effect on air quality of all sources and growth in the
10 effected area"? As a matter of law, we have to
11 determine what that clause means.

12 Is that the issue before us today?

13 MR. MCCONKIE: Correct.

14 MR. STEVENS: If I might add one
15 clarification, it is the whole sentence because we're
16 specifically dealing with whether we're dealing with
17 approved or unapproved sources.

18 MR. VERNATH: But the real question that
19 the parties have disputed is a question of law, and it
20 really boils down to that Sevier Citizens have
21 presented a different interpretation of improving
22 growth. So, today, as we're taking legal or oral
23 arguments, is the appropriate time for Sevier Citizens
24 to argue any precedence, or any knowledge, that they
25 have a question on of how a similar clause, and other's

1 rules, has been interpreted; is that correct?

2 MR. STEVENS: Yes.

3 MR. MCCONKIE: Mr. Stevens is going to
4 address Claim 3 with regard to the IGC issue.

5 MR. STEVENS: Let me point out also that we
6 challenged Claim Number 2, and Sevier County Citizens
7 has not challenged our motion on that one.

8 Claim 3, likewise, deals with only one question.
9 What does the law require? The Utah Air Rules require
10 that a prevention in significant deterioration of
11 source must employ the best available control
12 technology, which is defined in the Utah Air Rules.
13 And that regulation is Rule 307-101-2 subsection four,
14 and it defines the best available control technology.
15 And I will paraphrase here for the sake of time, an
16 emission limitation or other controls for the reduction
17 of each pollutant subject to a law which is achievable
18 for an installation for a control of such pollutant.

19 In this particular case, the Executive Secretary
20 did require consideration of integrated gasification
21 combined cycle as part of the BACT, the best available
22 control technology analysis. Integrated gasification
23 combined cycle, or IGCC, is not something that can be
24 applied to the SPC boiler that has been proposed by
25 Sevier Power. It would require, instead, if it were to

1 be used, a complete substitution of one type of
2 physical plant for another, and this conflicts with the
3 regulation's definition of BACT as an emission
4 limitation for proposed installation or source. The
5 BACT analysis is not used to determine what type of
6 source you will build. It is the source that has been
7 selected as an initial matter to determine what control
8 technology options you have. So control of those
9 technology options are defined by the type of facility
10 proposed which the law permits the source to choose.

11 Consistent with Division of Air Quality and EPA
12 policy, the Executive Secretary didn't require
13 consideration of IGCC in the BACT analysis which is the
14 factual question and legal question that has been
15 raised by Sevier County Citizens. They said that he
16 didn't require it. The Executive Secretary's response
17 is, "You're right. We didn't require it, and the
18 reason we didn't require it is because the rules don't
19 say we have to. The BACT analysis shouldn't be used as
20 a lever to force a redesigning of the source, so we
21 believed that the Executive Secretary performed his
22 responsibility in accordance with the law. And because
23 this doesn't present and issue of material fact, we
24 believe we're entitled to judgment as a matter of law
25 for this claim.

1 MR. VERNATH: I have a question for
2 (inaudible.) Mr. Nelson on this particular one, we
3 have an Exhibit A Attached which is the EPA letter, and
4 I think I need some help here. Is the (inaudible)
5 discussion of Exhibit A a question of fact, the origin
6 of this, the status or so forth, or is that
7 presentation of Exhibit A a question of law?

8 MR. NELSON: The letter occupies the same
9 status as if they were to decide a case that decided
10 the issue or had a previous ruling that the letter is
11 EPA's legal determination, and it doesn't control what
12 the board does. The board can interpret their own rule
13 and should do so. It's support for their legal
14 conclusion as in how the State rule shall be
15 interpreted.

16 MR. MCCONKIE: Okay. The next claim would
17 be Claim Number 6. Claim Number 6 states, "Maximum
18 predicted concentrations of PM-10 in areas where the
19 applicant has significant impact would occur along the
20 eastern edge of the proposed side's boundary, and as
21 the result of coal handling processes at the plant."

22 This is one of those claims that doesn't meet the
23 "and so" test. You know, you read this claim, and then
24 you say, "And so, what?" Nowhere in this claim does
25 Sevier Citizens allege that the law has not been

1 complied with. They merely point this fact out, a
2 point that the Division of Air Quality would agree
3 with. The question is whether a law has been violated.
4 So, on this particular claim, it just fails to state a
5 claim upon which relief can be granted. There is
6 really not a claim there to address.

7 Let's go to Claim 7. Claim 7 has to do with
8 scheduled burn programs, or potential scheduled burn
9 programs, Fish Lake National Forest and Dixie National
10 Forest. This is another question of law as to whether
11 the Executive Secretary -- And the applicable rule here
12 is R307-405-6, sub 2 which requires that approved major
13 sources be included in the Executive Secretary's review
14 of a PSD permit application. Source as defined in
15 R307-101-2 does not include prescribed burns in
16 national forests. The claimant does not dispute that
17 as part of the addition impact analysis required by
18 R3074063, the Executive Secretary notified various land
19 managers including the forest service. So because --

20 This claim, again, presents no genuine breach of
21 material fact. If, in fact, as a matter of law
22 R307-405-6 (2) does not require evaluation of these
23 types of scheduled burns, then there is no purpose to
24 put on evidence at a hearing on this particular issue,
25 and so the Executive Secretary would be entitled to

1 judgment as a matter of law.

2 Claim 10 states, Sevier Citizens states, that
3 EVAQ illegally did not consider the impact on water
4 fowl and wildlife, and then they cite the preamble
5 to the Utah Air Conservation Act which is 19-2-101 (2).
6 And basically what Sevier Citizens is doing is they're
7 relying upon this preamble to add an additional
8 requirement to the PSD requirements. This is a classic
9 example of where a preamble cannot be used as an
10 independent -- well, in any operative provision so as
11 to impose additional requirements, and so this is a
12 very good one for the board to consider as a matter of
13 law. The question is whether the rules require a
14 separate wildlife impact study as Sevier Citizens would
15 like to see.

16 Claim 11 states that, "The UDAQ did not
17 thoroughly analyze the impact of health issues on
18 citizens living in the shadow of the SPC Power Plant."
19 This is another one where the Executive Secretary is
20 entitled to judgment as a matter of law because the
21 rules do not require additional health impact studies
22 of individual cases. Sevier Citizens has submitted a
23 witness list with 35 or 40 people on this witness list,
24 and I would anticipate that a lot of these people are
25 going to come in and talk about these health problems

1 and talk about how they have asthma and how living by
2 this plant is going to exacerbate their asthma and
3 those types of things.

4 The question is where do the NAQs come into play
5 here? If the Federal Clean Air Standards are complied
6 with, then those things are taken into account. The
7 Federal Clean Air Standards are designed entirely
8 health-based regulations which take into account
9 sensitive populations, people with asthma, and those
10 types of things. And so the question for the board is
11 whether it would even be helpful to sit and listen to
12 all of that testimony, and, at the end of the day,
13 whether it would be make a difference if in fact the
14 NAQ requirements had been satisfied and the other HAPS
15 requirements.

16 I'm going to Claim 12. Claim 12 alleges that is
17 UDAQ failed to consider the financial impact of the
18 property values, job loss, and additional medical
19 expenses that people in Sevier County will suffer from
20 the approval order of the Sevier Power Company permit.

21 Now, to the extent that Sevier Citizens are
22 relying on R307-405-2 -- or -6, 2 AID, as a basis for
23 this claim, this is an allegation that fails the
24 Statement of Claim. Basically, what Sevier Citizens is
25 doing, is they are misreading this rule. The rule

1 states that "An analysis of the air quality related
2 impact of the source, including an analysis of the
3 impairment to visibility, soils and vegetations and the
4 projected air quality impact from general commercial
5 residential, industrial, and other growth associated
6 with source or modification." So, when you read that,
7 what they're doing is they're actually applying another
8 requirement. They're saying that the Executive
9 Secretary should have considered the financial impact
10 upon the property values, job loss, medical expenses,
11 etcetera, on the people from emissions from the plant.
12 But that's not what this rule says. This rule says
13 what the Executive Secretary evaluates is the projected
14 air quality impact from general growth associated with
15 the source or modification, not from the emission from
16 the plant itself. And so I think that's a -- I guess
17 it could be a subtle, but it is a very significant
18 difference, and I think that you need to read the rule
19 to make that distinction.

20 And then Claim Number 13, and this is the final
21 one. Again this, is where Sevier Citizens cites the
22 preamble to add an additional requirement beyond what
23 the rules require. It says, "UDAQ did not consider the
24 detrimental effects of the Sevier Power Company Plant
25 on the surrounding natural attractions of the state."

1 And then they cite 19.2-101-2.

2 The applicable rule is R307-405-62 AID. And this
3 is an issue which was reviewed by the Executive
4 Secretary, but it was with regard to the additional
5 impacts analysis of class-1 areas. And I don't think
6 there is any dispute that that wasn't -- that an
7 additional impact analysis of class-1 areas was not
8 done. And so this is just another example where the
9 preamble here is relied upon to add an additional
10 requirement, and so it fails to state a claim upon
11 which relief can be granted, and the Executive
12 Secretary is entitled to judgment as a matter of law.

13 I see that our time is up, but I want to kind of
14 quickly go through each claim. I don't know whether
15 there is any question at this time.

16 MR. VERNATH: I guess, instead, we'll give
17 you time for rebuttal.

18 So we'll now hear from Sevier Citizens.

19 MR. KENNON: Thank you. Normally I would
20 say, "Thank you, I'm glad to be here, but I'm not.
21 James Kennon, President of the Sevier County Citizens
22 Clean Air and Water.

23 MR. CUMISKEY: And I'm Dick Cumiskey,
24 Director of Sevier Citizens.

25 MR. KENNON: First, I'd like to start with

1 this, and I'm sure you're all familiar with, but I'd
2 like to remind you. "Utah Department of Environment
3 Quality: "Quality People for a Quality Environment.
4 Mission: The mission of the Department of
5 Environmental Quality is to safeguard human health and
6 quality of life by protecting and enhancing the
7 pollution prevention." That is your mission
8 statement. Your vision: "A quality environment will
9 be achieved through careful, open, fair consideration
10 of the concerns of all Utahans. Excellence in science,
11 communications and operations, timely effective and
12 consistent response to all customers actively promoting
13 pollution prevention." And that is what we believe
14 in.

15 And it depends on -- I hear a rule of law here
16 today, and it depends on how you interpret certain
17 things on whether you fulfill this mission or whether
18 you don't. I'd like to start off by -- before I get
19 into it, I'll probably run out of time, but that's the
20 way the ball bounces.

21 PacifiCorp sent in a motion in reference to
22 today's activities, and I would like to ask that that
23 motion be struck from the record. Mr. Jenkins said to
24 you earlier that, we all know the rules, we set the
25 rules. But their motion was not put in the mail until

1 the day after the deadline. I have the envelope here.
2 March 14th, even though the paper says the 13th. Mr.
3 Finlinson the same way, only he was two days late and
4 his is even marked, "Service, March 15th," not 13th.
5 So we're reminded all the time from one of these
6 attorneys on the opposite side that we must follow the
7 rules. Then let's follow the rules.

8 I'm also quite amazed that I hear about
9 certain -- particularly in -- this is jumping around,
10 IGCC. Everyone seems to know our position, but no one
11 has ever asked us, so I'd like to clarify some of those
12 as we go through today. Let's take the national parks.
13 And Dick will just jump in whenever he feels like it
14 here.

15 There is things about the national parks that
16 hasn't been said. For instance, I have a letter here
17 dated April the 12th, 2004, to Mr. Rick Sprott from
18 national parks. And here is just one paragraph,
19 "Although the proposed Nepco Plant is a relatively well
20 controlled coal-fire plant, we remain concerned about
21 the potential cumulative impacts on visibility."

22 Now, I want to tell you that there is things here
23 that gets me a little uptight because Mr. Sprott went
24 on Access Radio almost a year before this and said
25 there was no objection from the national parks, and, in

1 this letter, it tells you that they haven't even heard
2 about it yet. They aren't responding until April of
3 2004. Now, that's what we're here to ask for. We're
4 here to ask for a hearing, a full hearing, of all the
5 issues so that everyone can express themselves and be
6 cross-examined by the way. These papers are fine, but
7 you can't cross-examine them and they're not under
8 oath. Now, "Especially at Capital Reef, they're
9 concerned about," now, I wonder why he's writing this
10 if there is no problem.

11 "We are also concerned that the Utah Division of
12 Air Quality is not alert, FLM. Prior to issuing the
13 intent to approve notice, we would have appreciated an
14 opportunity to discuss this project with you before the
15 public comment period. As we have recently discussed
16 with you, and, other state directors, consistent with
17 the notification requirements and the visibility
18 regulation, we ask that you provide us with a copy of
19 the staff analysis and draft permit at least six to
20 eight prior to any public hearing."

21 And it goes on in the letter to state that they
22 feel that the public did not get a good chance to
23 comment because these procedures were not followed. I
24 can go on and on, but these are the things that need to
25 be heard in a hearing, not hear now.

1 The Executive Secretary had a chance over a year
2 ago when we put in our agency action to bring these
3 things up. He declined to do that. He had 20 days to
4 reply to us. That's your rule of law. He did not.
5 Another thing is that I've heard constantly at these
6 meetings, "The board is the person to determine. They
7 are the ones that should be hearing this." And these
8 attorneys use these words for their benefit, because,
9 now, they're asking you again for one person, Rick
10 Sprott, to make the decision on whether these are valid
11 or not. And we say to you, "You're the board, you
12 agreed with the hearing, let's go on with the
13 hearing."

14 Dick, do have you anything to add with the
15 National Park?

16 MR. CUMINSKEY: No, I don't.

17 MR. KENNON: I have some more material
18 here, but, you know, it takes a hearing to go through
19 this. And they even referred to the IGCC thing in
20 here. I know it is bouncing around, but these things
21 tie together. Clean air and dirty air go together.
22 You can't talk about one without talking about the
23 other. But there is a lot of things like that that
24 would take me a half a day to go through.

25 I guess, basically, our argument is this. We

1 were granted standing on certain points, and the
2 evidence that was presented at the time by the
3 Executive Secretary, and now he's decided that, no,
4 that he doesn't want to hear those things. I think it
5 is an injustice. I think it is an infringement on our
6 right of free speech.

7 IGCC, when it comes to IGCC, as we're working
8 here today, the very notion of that is in federal
9 court. As a matter of fact, the letter that you have
10 from Mr. Page, which has been wore out by the power
11 companies, that thing has been duplicated so many times
12 that that's part of the lawsuit. And I'd like to
13 remind you that that is only his opinion. And one
14 reason why for the lawsuit is because that's not the
15 way laws are made. That was never put out for a public
16 comment. That's one man's opinion on IGCC I can give
17 you other opinions where IGCC is viable, and it's
18 commercially available. And one reason for that is,
19 that over the time period that we've been involved this
20 thing, technology has changed. Attitudes have
21 changed.

22 There is a number of plants on the drawing
23 board. There is a number of plants that have been
24 commissioned to be built in IGCC. And there are other
25 arguments, by the way, when it comes to IGCC. It says,

1 "What are we looking for as citizens?" We think there
2 is some things that haven't been discussed at any of
3 these meetings that need to be discussed for the public
4 welfare, actually for the Division of Air Quality.
5 There are things such as, and this is where the
6 national parks come in it again, is that when they talk
7 about the visibility, there is some other wording in
8 those regulations that says that you will work to
9 improve the air in these parks. I don't hear the
10 powers companies talking about improving the air. Now,
11 how are you going to improve the air when you don't
12 start controlling pollution when you can, or
13 visibility?

14 MR. CUMINSKEY: While we're on the subject
15 of IGCC, there are any number of interpretations that
16 can be made on that based on all state and federal
17 law. We talked about the term "best available control
18 technology." One of the functions of the Utah Division
19 of Air Quality is to, say, approve an automobile paint
20 shop. Now, I come in here with you and present my
21 application to the department that says, "I'm going to
22 open up a paint shop." You say, "Fine. Where?"
23 "Well, out in front of my garage in the gravel." You
24 sort of look at me strange and say, "Well, what are you
25 going to do?" I say, "Well, we're going back to using

1 good old lead-based paint because it really sticks to
2 steel. And, oh, by the way, we don't need all these
3 scrubbers. We'll just let the wind blow the stuff
4 away."

5 So, the first thing your department is going to
6 say is, "Well, first of all, you've got to be in a
7 contained facility and it has to have proper air
8 filtration and removal equipment, you have to use a low
9 VOC paint that complies with certain department
10 standards, and if you do all that, we'll grant you a
11 permit."

12 All right, so you have imposed a system on that
13 automobile painter. By the same token, Mr. Stevens
14 said that we're not here to impose a system on the
15 applicants for an a power plant. They chose their own
16 system. Why didn't they choose open-hearth burning if
17 they really want the lowest cost system? They chose a
18 nice intermediate system. It is not a poor system. It
19 is a good system, but it is not the best available
20 control technology. And when we get to a hearing in
21 May, we'll be happy to discuss all those details. But
22 I want to point that out, that there are a lot of
23 different interpretations of what Mr. Stevens and Mr.
24 McConkie propose as rules as opposed to the way we have
25 read the rules. And in each of the 14 items in our

1 pleadings, we have cited specific rules and laws that
2 we feel are every bit as applicable as what Mr. Stevens
3 and Mr. McConkie feel. So, therefore, we're looking at
4 our 14 points as unique and comprehensive, and they're
5 not to be dealt with as 14 separate issues. It is one
6 issue which should be held at the appropriate hearing
7 in May.

8 MR. KENNON: I have another letter here
9 from the EPA, April 6, 2004, "Dear Rick," is the way
10 it's headed. And number one, it says, "IGCC is too
11 costly. It should be qualified." This is what the EPA
12 told Rick Sprott. Page 35 of the State's engineering
13 analysis says that "One of the ways to achieve best
14 available control technology, BACT, of level of
15 emission control is by good process design."

16 Page 20 of the engineering analysis briefly
17 mentions integrated gasification coal production as an
18 alternative production process for generating
19 electricity from coal. In our understanding of IGCC,
20 it is a potential lower polluting process than
21 circulating fluidized bed combustion. The State's
22 analysis says IGCC was not chosen due to the higher
23 cost. We recommend some qualifications so the costs be
24 provided to support the statement of IGCC is too
25 costly.

1 Now, that's what the EPA sent in 2004, and then
2 we have other letters that will indicate the same kind
3 of thing. These are the things we want to bring up at
4 the hearing. You know, here we are halfway into our
5 time and we haven't even started. You cannot give our
6 group justification by limiting our testimony. You've
7 already limited our testimony on these issues by saying
8 that the hearing is going to be one day in these
9 hours. That is a cap in itself. Then we've got to
10 make choices. We've got to make choices of what we
11 have to make just actually like we're doing today, what
12 is important to us and what we're going to have to let
13 slide by because we aren't going to have a chance to
14 air our grievances.

15 So it is been capped with one day, and I read in
16 the motions were sent in to you as a board suggesting
17 that you streamline the process. I do not think that
18 streamlining the process is the way to get justice. It
19 just kind of upsets me to hear words like, "you're
20 valuable time." My time is valuable also. I don't
21 want to be here just like I said. We shouldn't have to
22 do this. We could have had some prehearing
23 conferences, but I was denied those. As much as --
24 They'll tell you, "Oh, no." I asked for meetings. No
25 there is not going to be anymore meetings. That's why

1 we're here today. When we started out with this
2 process, and I thought it was going along well, at one
3 point, things seemed to go sour. From that point on,
4 it was, "Shut out the citizens." And that's what I see
5 here with these 9. Out of 14, 9, IGC and health are
6 two of the big ones. We know that we're stuck with
7 whatever you decide whether we like it or not, but I
8 can tell you this is going to be one county very
9 unhappy if they're not able to get up and give their
10 testimony.

11 Ambient air, next claim was the impact on PM.

12 Would you like to take that? Well, Dick he's
13 ready to give up.

14 MR. CUMINSKEY: Well, the wrong word.

15 MR. KENNON: Well, wrong word, but that's
16 about what it amounts to. We're in disgust. We are
17 not attorneys. What you're going to hear from us is
18 plain language, how the people feel about things, how
19 they look at it and what they've got to live with.

20 You might say that the property values are not of
21 any consequence. Well, that's great if you live in
22 Salt Lake, but if you live down in Richfield, you might
23 be concerned.

24 I think there is a valid argument for all nine
25 that you have before you, but obviously, when I listen

1 to attorneys, they say that we have no case. Well, the
2 people don't feel that way. Five hundred people almost
3 signed that agency action. They feel they have a
4 case. Just recently, we filled a big room in the
5 Sevier County Courthouse with a number of deputy
6 sheriffs. I guess they thought we were going to get
7 out of hand. And they weren't there to praise the
8 power company. There was some there, but I'll tell
9 you, the way this is going to be handled is going to be
10 important.

11 I can tell you that -- I mentioned the health
12 issue, but another issue is the impact on soils, and
13 that impact on soils kind of brings to the forefront
14 what our arguments are here. There is a section in
15 there where it discusses soils. It is on one page. The
16 guy made a few phone calls to Richfield and said there
17 is no problem. Well, we beg to differ. We beg to
18 differ. One reason that you'll find that there is not
19 much of a problem with soils and vegetation in the West
20 is that not many studies have been done. And the
21 studies that are being done, one of the main ones is
22 right in Colorado, and they're finding now that the
23 Alpine terrain is changing from pollution, that the
24 grasses are going to take over.

25 And one reason why is most of the pollution is in

1 the East. Most of the colleges that do studies for
2 pollution are in the East, so the West is just starting
3 to feel it. Do we wait until we're dealing with
4 pollution like they have in the east? I can tell you
5 right now, you as an air quality board, a lot of people
6 in Sevier County are looking north and saying look at
7 North, look at Logan that the paper. You know, you
8 have to hope for a high wind to blow the pollution out
9 so you can breath up there so the kids can go out and
10 play. You have the reigns of controlling that. And
11 they're saying, and I'm saying, "Look, it wasn't that
12 way before and it's dirty now. What happened? If you
13 have all these rules that work, what happened?"

14 Now, you can say growth, and then you get back
15 to growth again. Look at the growth in their notice of
16 intent. It is two little paragraphs. That's the kind
17 of study that was done for this plan, two paragraphs on
18 growth. But, you know what? When Sevier Power wanted
19 to sell the citizens of Sevier County, they came out
20 with a sheet and a half of what growth was going to
21 come to the county. Was that growth figured in for the
22 study of this plant? No. That's why we need a
23 hearing. Any questions?

24 MR. VERNATH: Could we also address the
25 question of the Executive Secretary's motion to dismiss

1 your first one where there is --

2 MR. KENNON: Yeah. That, to me, I hate to
3 say it, but is a no-brainer. Well, here we are wasting
4 our time on this. It's immaterial. We haven't brought
5 up any other issues other than the 14. Let's move on,
6 get it done. I mean, I don't see where -- We spent all
7 this time. For what, so that the attorneys will feel
8 better the next day? I don't see where that's the big
9 deal to me. But the big deal is, let's get on with it.
10 Let's do it and get it over with instead of playing
11 around with word games. That's all it is, word games.
12 We're not here to play word games. And that was one
13 document. It stated right in the second document, I
14 mean, as clear as -- It is clear to me, but not to the
15 attorneys or not to the Executive Secretary.

16 MR. VERNATH: You're saying it's one
17 document?

18 MR. KENNON: And we have no intention of
19 bringing in any other points. We can't get the 14 in
20 we got, so, I mean, the issue is just -- It is a
21 non-issue.

22 MR. CUMINSKEY: One last closing statement.
23 Sevier Citizens, of course, represents, loosely, a
24 great number of people who reside in Sevier County,
25 Sevier Valley. And, in particular, 183 homes which are

1 located within one and three quarter miles of this
2 proposed plant. 3,177 tons of pollutants that have
3 been authorized by this approval order that will
4 directly impact that community of 183 homes. I mean,
5 it is close enough you can hit it with a baseball. And
6 that's what we want to you consider when we look at
7 each of these points in the Division of Air Quality
8 approval order. This isn't affecting somebody 20, 30,
9 40 miles away. The closest house is one half mile from
10 that proposed plant, and if we don't have a
11 state-of-the-art plant that does everything possible to
12 protect the health and welfare of those people, then it
13 is the responsibility of this board.

14 MR. KENNON: I think we've gone over. But,
15 in the past -- But Sevier County has one of the highest
16 percentages of cancer in the United States as a matter
17 of fact. And, you know, even though we don't know what
18 causes all types of cancer, we know that there is
19 triggers. And to put in another possible cancer
20 causing element, to me, is criminal. We got residences
21 that are still trying to collect on down-winders.

22 Thank you.

23 MR. VERNATH: Mr. Kennon, one question.
24 You stated today, you implied today, that the hearing
25 is not going to be enough time for you to present your

1 evidence. I know the length of the hearing was
2 established earlier in the process by how many exhibits
3 and how many witnesses and so forth. Is that the first
4 time that you've shared that with the counsel for the
5 other side that you were not going to have enough time?

6 MR. KENNON: Yes. Basically because --
7 something to the words was -- Well, I asked for
8 meetings for this entire reason. And not only that,
9 because we're novices. We're not attorneys. And I
10 thought that we could sit down. I've been involved in
11 a few legal matters, as you might imagine, and usually
12 we sit down and the two sides sit before you go to
13 trial and you try to work out some understanding, even
14 wording, and that kind of thing. And I asked for a
15 meeting and I was told, "There will not be anymore
16 meetings with you." That's the way it went.

17 MR. NELSON: I think since today is the
18 prehearing conference, this is the official time to
19 resolve that. I'd welcome you to articulate what you
20 feel your needs are to present all the documents and
21 witnesses and why you need that much time.

22 MR. KENNON: This is where we sit now, or
23 this is the way I feel at least. As we were coming up
24 here, I discussed it with the others. I couldn't even
25 tell you. I assume we're having a prehearing

1 conference, and we won't know what we're going to even
2 do with the hearing. At this moment, I do not know
3 what I'm going to be presenting at the hearing because
4 you're going to decide that right now. And then when
5 you decide that, or whatever you do, then we'll have to
6 go for a hearing, and then we'll start. And I have no
7 chance to confer with, like, my board of directors or
8 anything else. It's by the seat of my pants, "Well,
9 yeah, well, this, this and this." You know, it just
10 didn't make any sense to me.

11 But I know that in some of the motions it says,
12 "Well, you shouldn't have agreed to the scheduled if
13 this is the way it was going to be." But, you know,
14 maybe I was blindsided. I did not expect the Executive
15 Secretary to be the one to put in a dispositive motion
16 at the last moment, because he had his chance way back
17 when we but the agency action in. I felt there may be
18 some Pacificorp maybe and Sevier Power Company.

19 But we'll do the best we can with what we have.

20 MR. VERNATH: Okay. Today is the time for
21 to you articulate what you need. We will have to make
22 a decision. We're now late stage in the game
23 constraining, but I think you're entitled to tell us
24 how many documents, and what you need to present
25 the --

1 MR. KENNON: That will depend on whether we
2 have nine points or ten points or six points to talk
3 about. And, like I say, IGCC is one of our main
4 concerns and health, and if we don't have those two, it
5 is almost like a waste of your time because they're
6 important issues. Whether you think the law covers
7 them or not, we don't think they do. As a matter of
8 fact, I submitted to you some supplementing material
9 there from the EPA that says there is no safe level of
10 ozone period.

11 Now, the rule of law says you will use the latest
12 scientific data to make your decisions, and, if you do
13 that, you will say, "Maybe we need to take another
14 look." You know, that's what we're saying is, mainly
15 with this entire thing is, maybe you need to take
16 another look on this permit that's been given out.

17 MR. HORROCKS: Couple of quick questions.
18 In your response to the Executive Secretary's motion,
19 you mentioned on your Claim 3 that it is your intention
20 to provide an expert witness in Richfield to discuss
21 the issue of IGCC.

22 MR. KENNON: Yes.

23 MR. HORROCKS: My question is what topic do
24 you think will be addressed? Will the topic be
25 addressed as to whether that should be a legal

1 requirement of the BACT analysis? And is your expert
2 witness on the list?

3 MR. KENNON: Yes, he's on the list. I do
4 not think it will be a legal judgment that he will
5 portray. He's the consultant. I believe he's around
6 now, but when we talked to him the last time, he was
7 going to India to testify. And later in May, the
8 middle of May, he is going to be in China, so he's a
9 consultant that works worldwide. But it would be a
10 discussion on IGCC, not on the legal issue, but the
11 process, some of what you've heard here. And the
12 process is in question. Like I say, it is enough of a
13 question that it is in federal courts right now, and I
14 think it just needs to be hashed out to make the issue
15 clearer.

16 For one thing, IGCC has taken the nation by
17 storm. I'd hate to say, but if you went to GE or Becko
18 (phonetic) and told them that IGCC was not commercially
19 available, I think they would tell you something
20 different. And a lot has changed. The price is coming
21 down which is another issue. We don't think that the
22 costs have been clearly satisfied when it says this
23 cost is too high. Maybe the cost of not doing it is
24 too high.

25 MR. HORROCKS: Another question that has to

1 do with your Claim 11. Again, in your response to the
2 Executive Secretary's motion, you reference section
3 R307410-4, and my question is, does the Sevier County
4 Citizens maintain that the Ambient concentrations that
5 are being proposed are greater than the toxic screening
6 levels that are set by law? Or do you maintain that
7 any level has a detrimental effect?

8 MR. CUMINSKEY: Our claim is that as far as
9 we can determine from reading the documents submitted
10 by the department here, that uniform distribution was a
11 factor of concern where, in fact, the shape of our
12 valley tends to create intense concentrations in
13 certain areas, and it is very very possible that some
14 of these areas, particularly such as that housing area
15 I just mentioned, could become subjected to, not
16 uniform distribution, but concentrated dispersal of it,
17 and exceed the limit within that particular area.

18 MR. HORROCKS: So it is your intention at
19 the May hearing to talk to the validity of the numbers
20 that are presented in the analysis then and present
21 evidence and testimony contrary?

22 MR. CUMINSKEY: That is correct.

23 MR. VERNATH: We're going to take a minute
24 while the court reporter changes tapes.

25 (Whereupon, a brief recess was taken.)

1 MS. NIELSON: I don't mean to prolong
2 this. My question goes to your response to Mr.
3 Horrock's question a moment ago on Claim Number 11.
4 The issue was basically what were you concerned about
5 there, or what were you proposing, and my understanding
6 was that -- Your response was that the emissions would
7 not be uniformly distributed through the area, but,
8 because of the nature of the valley, that there would
9 be concentrations in certain places? Am I
10 understanding that correctly?

11 MR. KENNON: That is correct. I guess that
12 causes me to wonder about Claim Number 6 which concerns
13 the application of, or the potential, for significant
14 impact that could occur along the eastern edge of the
15 proposed site boundary. Is that the same sort of
16 issue? Or if it isn't, could help me understand that
17 --

18 MR. CUMINSKEY: It's a very similar issue.
19 Issue Number 6 was oriented to PM-10 and the other
20 issue is just oriented to the additional pollutants,
21 the permitted pollutants.

22 MS. NIELSON: But is it an issue of
23 distribution?

24 MR. CUMINSKEY: They're similar, yes.

25 MS. NIELSON: Thank you.

1 MR. VERNATH: So, again, to clarify, what
2 you would be talking about is the adequacy of the
3 modeling that was done, the numbers that were modeled
4 versus what you think might be the real concentrations?

5 MR. CUMINSKEY: That is correct.

6 MR. VERNATH: That sounds like issues of
7 fact to me.

8 MR. GROVER: I just have one question of
9 the Executive Secretary.

10 MR. VERNATH: We'll be doing formal
11 rebuttals. Have you got a quick question now?

12 MR. GROVER: Yeah, I want to basically hear
13 what they had to say before I asked it.

14 I guess my question is on Claim Number 12, your
15 interpretation of the R30740663AID. The question is
16 would all that be included in an NAQAS determination,
17 and why is that rule existent if that's the case? Your
18 asserstion is, and it's already covered -- You said it
19 is covered by the standards beyond those required by
20 state and federal regulations. You know, additional
21 medical expenses caused by air quality impact, for
22 example, how is that already covered?

23 MR. MCCONKIE: Well, let's look at the
24 claim.

25 MR. STEVENS: I think what's really at

1 issue here is -- Well, let me make sure I understand
2 your question. You're saying if the air standards and
3 other things already account for these things, why is
4 there a rule?

5 MR. GROVER: Yeah.

6 MR. STEVENS: Okay. I think what we're
7 saying in response to this is there is no extra
8 requirement to consider financial impact of property
9 values, job loss, and additional medical expenses that
10 the people from Sevier County suffer from the AO. Now,
11 if you read what the rule says here, it says, "Make an
12 analysis of the air quality related impact of the
13 source, including an analysis of the impairment to
14 visibility, soils and vegetation and the projected air
15 quality impact from general, commercial, residential,
16 industrial and other growth," not the impact on whoever
17 lives there.

18 MR. GROVER: I understand. I think what I
19 heard them say, though, is they had issues on soil,
20 vegetation, etcetera. Again, it may not be quite that
21 clear. They're including that, I think, in their
22 property values potentially going down because of some
23 finding that there is impact there. I'm trying to get
24 to the fact whether they're going to present facts that
25 would be relevant there.

1 MR. MCCONKIE: Maybe I can address that.
2 One of the claims that will be going to trial is Claim
3 Number 9 where they allege that UDAQ did not require
4 sufficient analysis of the impacts of the Sevier Power
5 coal-fire power plant on soil, vegetation, wildlife and
6 animals.

7 MR. GROVER: And I guess to the extent that
8 that would slop over into property values. I don't
9 know. I'm just trying to --

10 MR. STEVENS: Well, it's is our position on
11 that basically what this is doing is reading into the
12 rule something that isn't really there. Claim 9,
13 instead, specifically deals with soil and vegetation,
14 and that's one we believe that there is a dispute of
15 material fact on it. And that will be addressed at the
16 hearing no matter what decision is made today.

17 MR. GROVER: That's what I was trying to
18 get at.

19 MR. VERNATH: To get kind of back on order
20 here, I think we should next hear from Sevier Power,
21 and then if the Amicus, Pacificorp, wants to speak, and
22 then we can have rebuttal.

23 Mr. Finlinson.

24 MR. FINLINSON: First of all, I didn't file
25 a dispositive motion on behalf of Sevier Power

1 Company. What we filed was a statement in support of
2 the motions filed by the division. So I think
3 basically I didn't have a motion to file, and I was two
4 days late, but you didn't have to propel me to
5 respond.

6 Anyway, but, I think the two motions that the
7 secretary mentioned make a lot of sense. First of all,
8 I couldn't figure whether James was suggesting that you
9 clearly ought to grant that first motion because
10 everything in their first one they've rolled into the
11 14th, or I don't know whether there is any dispute.
12 But I think it is there, it needs to be resolved, and
13 it has clearly been rolled in with everything that
14 we've been proceeding with, so I think that's an
15 appropriate action to take in dismissing their first --
16 their claim that they filed in 2004. We concur with
17 those motions to knock 9 of the claims out of the 14,
18 and we could go through them very quickly with you.

19 The one, their claim, is a question of whether or
20 not we monitored approved sources. The language, I
21 think, at the requirement of the Executive Secretary is
22 that you have to put approved sources on and we have
23 fully complied with that with the monitoring that we've
24 submitted. The question is, are the ones that are
25 pending, or would like to be pending, approved? And

1 the answer is, no, they're not. So we think, in that
2 situation, that we have in fact complied with that
3 requirement and that the Executive Secretary is
4 entitled to a summary judgment motion on that issue.

5 The second claim really deals -- it is a standing
6 question; do we have to wait until we're injured in
7 order to raise the issue? And we've already dealt with
8 that because you granted standing to the Sevier
9 Citizens, so that issue I think is really moot now and
10 could be dismissed as a matter of law.

11 Then the big question is this -- their Claim
12 Number 3 about the IGCC. Whether or not that is really
13 a different process or is it a controlled technology?
14 And the EPA has concluded from their internal
15 operations and ruling that it is not a control process.
16 It is a process. And what they are suggesting is that
17 if we submitted a gas-fire project, they could
18 consider, or suggest, that "Well, you really ought to
19 do coal."

20 It is not what we've submitted. The process is,
21 did the process that we submit meet the Air Quality
22 Standards and are we entitled to permit? It's not a
23 question of do you want to go with a different option?
24 Do you want to go with pulverized coal? No, we've
25 selected a circulating fluidized bed. And that

1 process, if it meets the requirements, and can do that,
2 should be entitled, so we think really that that is an
3 issue that can be dealt with on a summary judgment
4 because there is really no genuine issue.

5 I think the Pacificorp response where they
6 specifically came to that is a very detailed analysis
7 position of the EPA and the way that that issue ought
8 to be resolved.

9 The Claim Number 6 deals with the concentrations
10 of PM-10. And one of the things we need to point out,
11 because it is applicable in this area, and also in
12 other ones, the monitoring requirements required by the
13 division have a monitoring requirement for -- They call
14 it the "near field monitor." So, in that process, you
15 look at what happens right around the plant and the
16 areas that are adjacent to it. You have requirements
17 you have to meet to make those. And the next one is
18 you have to do the generalized monitoring for the whole
19 valley. And so the internal process and requirement of
20 the division, you have to look at that so that you
21 avoid this concentration issue that was raised by the
22 citizens. Internally you have you have already dealt
23 with that issue.

24 But our PM-10 requirement, we have to meet if it
25 is in the center of the smoke stack or whether it is

1 out on the roads for the trucks or anything along in
2 that and the monitoring suggested that we hit within --
3 We're down to 20 percent of the allowable level. And
4 so that we feel that we have complied with that one and
5 there was no error committed in this requirement
6 related to this provision.

7 The next one was a question about scheduled
8 burns, and I thought that was a very interesting
9 process. Temporary burns, or the scheduled burns, are
10 really temporary sources. They are not stationary
11 sources. And the division has appropriately pointed
12 out that they're handled with a separate program that
13 deals with scheduled burns. And then they factor that
14 into the background requirement, and that gets first
15 cut at what is available of the air quality in your
16 area. You have to meet that, and then your plant
17 requirements come on top of it. You still have to be
18 under the federal standards or you don't get permits.

19 And when they go to burn in the future, whether
20 they use the BLM or the Forrester Service, you have to
21 get a state approval to go through the temporary burn
22 program in order for them to do that. So that's
23 scheduled. It really was appropriate for the director
24 not to bring that into analysis because it is dealt
25 with in a different process as already has been pointed

1 out.

2 Their Claim Number 10 about the impact of water
3 fall, those secondary requirements that are part of the
4 National Ambient and Air Quality Standards are designed
5 to provide that protection for wildlife. And the
6 general rule is that you comply with those
7 requirements, and then you have met that provision that
8 is mentioned in the general intent statement. But to
9 go into the general intent statement and pull out a
10 specific item to put on the study list or the list that
11 has to be crossed off is not the way your plan
12 operates.

13 Number 11, and this is an interesting one dealing
14 the health impacts. And, again, this is that same
15 issue that they've raised before, the primary concern
16 of the National Ambient Air Quality Standards are
17 health-based standards. And a tremendous amount of
18 work and science went into identifying those limits.
19 They said these are what the rules are, if you meet
20 these requirements, you're going to be okay on the
21 health issues. And so to go out and conduct another
22 study really isn't the program that the State of Utah
23 has been operating under since you've had primacy. So
24 we concur with the provisions that were mentioned there
25 by the secretary.

1 Number 12 is kind of an interesting claim.
2 They're trying to bring that impact of air quality and
3 bring it into a physical impact, and, yet, when we
4 suggested earlier in this process that, "Wait a minute.
5 We ought to talk about the physical impact of what this
6 is going to bring to the county." Suddenly we were
7 chastised by the citizens group that this decision
8 shouldn't be one on economics, it should be one air and
9 air impact.

10 So if you want -- Well, first of all, I don't
11 think that the reading is right to bring physical
12 impacts in, but if you do, then we would suggest that
13 you really need to open that up so that we can bring
14 out all of the physical impacts and the good that we
15 think a project will do.

16 Now, when Millard County was making their
17 decision on whether or not they wanted to be a
18 participant in the IPP3 case, it was very clear from
19 the county's position that they viewed the positive
20 economics of the power plant to be something that they
21 were very supportive of. And I really think that we
22 could tell that story, but I think that your rule is to
23 focus on the air quality issues and not attempt to
24 bring in economic impact. If you bring in the economic
25 impacts of one side on that issue, then you certainly

1 should be required to allow that on both sides.

2 The final one deals with the detrimental impacts
3 on the surrounding natural attractions. This is,
4 again -- I think when you overlook -- The national
5 plans to protect those significant areas is the
6 designation of class-one air status. And the parks,
7 and these areas of natural concern that they're talking
8 about, are class-one categories, the desire to
9 determine and should receive significant impact or
10 protection. I better get that -- Excuse me --
11 significant protection. And that was a significant
12 part of the modeling that we had to submit to show that
13 it would not create an impact on those class-one
14 areas. So that process has been complied with. And, I
15 think, again, we would be very supportive of the
16 Executive Secretary's position that their Claim Number
17 13 should be dismissed and that he'd be entitled to a
18 claim based on a matter of law.

19 So that's our brief response. We are supportive
20 of the motions, both motions, filed by the Executive
21 Secretary. I would be glad to respond to any questions
22 is any of you have.

23 MR. VERNATH: Questions to the board.

24 One comment. I think when you were referring to
25 Claim 6, I think you said "monitoring," I think you

1 meant "modeling."

2 MR. FINLINSON: Yes. We have to monitor so
3 we can then model based on the information we picked
4 out. Thank you for that correction.

5 MR. VERNATH: Mr. Jenkins.

6 MR. JENKINS: Thank you. As the board is
7 aware, Pacificorp is only interested in Claim 3 in this
8 matter so my comments will go only to that particular
9 claim. I might suggest, if it's okay with the board,
10 I'll also do my rebuttal at the same time since I'm
11 coming to the end of all of the other arguments, and
12 then I don't have to come back up here again, if that
13 that works.

14 We submitted an extensive briefing on the legal
15 issue of whether IGCC must be considered during the
16 BACT process for a source proposed that uses coal as
17 it's fuel. And our conclusion is, as the board is well
18 aware, is that, no, as a matter of law, IGCC need not
19 be considered as BACT. I say that on the one hand, and
20 on the other hand, we said in our pleadings, and we've
21 said orally in these hearings to the board before,
22 Pacificorp is not opposed to IGCC technology. In other
23 forums, we have committed to study that and are
24 spending great amounts of money studying that
25 technology.

1 It is not that we're opposed to IGCC. But, as a
2 legal issue, we are opposed to having IGCC forced on a
3 facility merely because, as a control technology,
4 merely because it proposes to use coal as a fuel source
5 for an otherwise conventional coal plant, in this case,
6 a circulating fluidized bed plant. And so that's the
7 distinction. The concept is fine. As a legal matter,
8 under existing law, it can't be forced on Sevier Power
9 Company, or any other source, merely because they
10 proposed an electric plant that uses coal.

11 Some mention has been made from this letter from
12 EPA which clearly sets forth EPA's position, and that's
13 been provided by the court as well, that IGCC need not
14 be considered -- cannot be considered during the BACT
15 process. PacifiCorp supports that letter, and would
16 urge the board to read it.

17 I take just slight exception with the advice that
18 Mr. Nelson gave you in regards to that letter and in
19 regards the board needing to interpret its own rule as
20 opposed to relying exclusively on EPA's rule, and
21 perhaps take exception it's too strong. I would like
22 to point out that by state law, Utah Code Annotated
23 19-2-106, the board is required to pass rules, and I
24 would suggest, interpret existing rules in a way that
25 is consistent with federal rules. And so I agree that

1 that letter provides guidance, but I think it provides
2 a little bit more, and the board has to take
3 extraordinary action to interpret its BACT rule
4 differently than the exact federal rule. And so,
5 again, I would urge the board to follow the EPA
6 letter.

7 And I'll quickly respond to some of the points
8 that Mr. Kennon raised. I don't doubt his sincerity or
9 good intentions at all. I admire his courage in the
10 effort he has made to promote the positions he believes
11 in. But the simple fact is that at least on Claim
12 Number 3, even if he presents the evidence he claims he
13 will present, even if he presents an expert witness who
14 discusses the IGCC process, none of that will change
15 the ultimate outcome that this board by law has to
16 conclude, and that is that IGCC, by law, cannot be
17 considered during the BACT process for this or any coal
18 plant. And so I would urge the board with all due
19 respect to Mr. Kennon and his citizen group and the
20 positions that have been offered that the board can
21 dispose of this issue now and should and provide
22 opportunities for the citizen group to comment on other
23 issues that will be heard at the hearing in May.

24 Mr. Kennon mentioned that the EPA letter was one
25 person's opinion, and I would submit that it was more

1 than that. The letter was offered by Mr. Steven Page
2 who is EPA's appointed person, the director of The
3 Office of Air Quality Planning and Standards, the very
4 person appointed to issue statements like this, like
5 the one that is included in that letter, and so it is
6 more than just one person's opinion. He mentioned
7 that the letter was issued without public comment, and
8 I would take exception to that as well. The letter is
9 merely commenting on existing federal rules which in
10 fact were promulgated after public process including
11 public comment, and so it is not quite accurate to say
12 that the letter was not issued with public comment.

13 Mr. Kennon suggested had IGCC is available right
14 now. And for the board's information, there are two
15 existing IGCC facilities in the United States that are
16 operating right now. There are pilot projects, for a
17 lack of a better term. There are many companies,
18 including my own, that are examining whether IGCC can
19 be built successfully and commercially and operate on a
20 reliable basis, but no one has made the final decision
21 to build those, no one has built them, and there is
22 none operating, at least, other than those two, what I
23 would call "pilot projects."

24 Mr. Kennon suggested that he was going to present
25 an expert witness, although, he didn't identify which

1 one that would be at the hearing to talk about the IGCC
2 process, and I would suggest, again, that that is not a
3 relevant issue when the board is considering whether as
4 a matter of law IGCC can be required at all. Mr.
5 Kennon also mentioned that Pacificorp's pleading, and
6 he wasn't clear on which one, was filed late. And for
7 the board's information, Pacificorp filed it's reply to
8 the citizens group's response, which was responding to
9 the Executive Secretary's motion for judgment on the
10 pleadings. We filed our reply on the 20th of March
11 which was the very date that the reply was due.

12 And with that, if there is any questions, I will
13 be happy to respond to them.

14 MS. NIELSON: Just a clarification on an
15 earlier statement. Is it your understanding that state
16 law would enable the board to be more stringent than
17 federal law if they provided a justification on the
18 record for their determination?

19 MR. NELSON: Yes, but in a very narrow
20 circumstance. And that circumstance, as I understand
21 it, is in the rule making process in terms of
22 promulgating a rule that is more stringent than federal
23 law. I do not believe that applies to interpreting an
24 existing rule that is supposed to match federal law. I
25 hope that makes sense.

1 MR. VERNATH: Kind of following up on that.
2 Since you asked us to give great reference to that EPA
3 -- which I refer to it as a guidance letter -- are you
4 aware of any litigation regarding that letter?

5 MR. NELSON: In fact, thank you for
6 bringing that up.

7 Mr. Kennon mentioned some litigation and, in
8 fact, there are one or two, and I don't know which,
9 lawsuits that have been filed that I'm aware of that
10 involve the issue addressed in that letter. They are
11 not, as I understand it, direct challenges to the
12 letter itself. For example, they are not challenges
13 saying that EPA is improperly setting policy or
14 improperly setting rules. Rather, they're challenges
15 to the letter that says what EPA's policy is now and
16 has been all along.

17 And, again, I think they're -- You look confused,
18 so I hope I didn't say that in a way that was
19 confusing -- but those lawsuits, as I understand them,
20 are not directed specifically at this particular
21 letter, but it is somewhat like that proceeding where
22 there is an issue involved in that litigation, and that
23 letter is part of that issue.

24 MR. VERNATH: And, I think, you know, as I
25 understand (inaudible) difference on what the issues

1 are.

2 MR. NELSON: Right.

3 MR. VERNATH: Are you aware of any other
4 jurisdictions that have dealt differently with the
5 issue of IGCC (inaudible)?

6 MR. NELSON: There have been a number of
7 jurisdictions that have dealt with this issue. I don't
8 have the statistics on the top of my head, but,
9 generally, most have concluded that IGCC is not
10 required under the BACT analysis. I believe a few, and
11 I think New Mexico is one of those, and there may be
12 others, that have not taken a hard and fast legal
13 position yet, but they have required, or the applicants
14 in the proceeding have volunteered, to go ahead and do
15 the IGCC analysis anyway.

16 This proceeding is different. We have an
17 applicant who is not proposing to do that. And our
18 position is, as a matter of law, the board can't
19 require an applicant to do that.

20 MR. VERNATH: You did make a comment that
21 there are only two plants and no one else has made the
22 final decision. And I would like to read out of the
23 Annual Report from American Electrical Power here, they
24 say, "(Inaudible.) "

25 So, different utilities have had different

1 opinions on this and I think --

2 MR. NELSON: Well --

3 MR. VERNATH: And you're saying you
4 don't --

5 MR. NELSON: There is no question they
6 have; AEP is one, and Synergy is another. And there
7 are other utilities like us who are examining the
8 issue. None are being forced to install because of a
9 BACT determination. And may I also suggest for the
10 board's consideration, there are various stages of
11 building a power plant. It is easy to announce that
12 you are going to build one, but there are engineering
13 studies. With a IGCC plant, there is something called
14 a "FEED study," or a "Front End Engineering Design
15 Study." It's very expensive. If my memory is correct,
16 as much as ten million dollars just to do the
17 engineering study. I believe that's the stage AEP is
18 at. And, once that study is done, then you have to do
19 the actual design work and the construction work, and,
20 then you have to get the whole thing to work. And from
21 a utility perspective, not just work, but work
22 reliably. We operate coal plants now that have a
23 reliability of upwards of 90 percent, and IGCC
24 facilities come nowhere near that kind of reliability.
25 Of course, you and I want the lights to turn on when we

1 flip the switch, and as a power company, our job is to
2 make sure that can happen. And introducing a
3 developing, but still risky technology like IGCC,
4 creates a problem, both when you turn on the lights,
5 and power there, to make sure the lights work when you
6 flip that switch.

7 MR. VERNATH: Other questions? Thank you.

8 MR. SORENSON: Just as a follow up, when
9 you went through the rate making case with BHC, were
10 the economics of the projected evaluated as far as the
11 technology?

12 MR. NELSON: Which --

13 MR. SORENSON: I'm assuming that as part of
14 approval of the project, you actually went through the
15 utilities commission rate making case.

16 MR. NELSON: Which project are you talking
17 about?

18 MR. SORENSON: This particular project
19 that's being proposed.

20 MR. JENKINS: Well, this isn't our project
21 that's being proposed, but when we go through, if we
22 were proposing a power plant, we would in fact have to
23 go to the Public Service Commission to get approval, to
24 get them to agree that there was a need, a public need,
25 to build this type of facility. There would be a

1 proceeding there to determine whether or not the
2 economics are right, it is right for the customers, it
3 is right for the community, and those sorts of things,
4 so that kind of process would take place.

5 In this case, of course, this is the Sevier Power
6 Company proposing their facility in which we don't have
7 an interest. Our interest is merely in this issue of
8 IGCC can be forced on a source during the BACT
9 process.

10 MR. VERNATH: Come up and identify
11 yourself.

12 MR. WAGNER: I'm Tim Wagner, the
13 conservation coordinator for the Utah chapter of the
14 Sierra Club.

15 MR. VERNATH: Okay. Fred is saying that
16 you're not a party.

17 MR. WAGNER: Right.

18 MR. VERNATH: If this were a general
19 question from the audience about what is going on, but
20 if you're trying discuss -- No.

21 MR. NELSON: By not being a party to the
22 proceeding, this is a formal adjudicative process, and
23 so you're not eligible.

24 MR. WAGNER: Can I address item B on this?

25 MR. VERNATH: I don't think so. Sierra

1 Club has been declined to participate.

2 MR. WAGNER: Okay.

3 MR. VERNATH: Okay. Does the Executive
4 Secretary have any rebuttal?

5 MR. STEVENS: Just a few comments.

6 MR. MCCONKIE: Paul McConkie representing
7 the Executive Secretary.

8 I too can sympathize with the Sevier County
9 Citizens' position. I think that we're certainly not
10 here to try to stifle their desire to be heard. I
11 think -- I imagine if a power plant was being built in
12 my backyard and somebody wanted me to sign a petition,
13 I might sign that petition. I think it is something
14 that, you know, citizens are concerned about, and we
15 certainly recognize that. But, I think, this is a
16 legal proceeding and legal standards need to apply and
17 govern this proceeding. And so whichever claims go to
18 an evidentiary hearing, there needs to be a genuine
19 issue of material fact for the fact finder so that the
20 fact finder doesn't listen to a bunch of evidence which
21 makes no difference in this decision. I think that it
22 is really what it comes down to.

23 I think it is important also to remember that
24 there are some very significant issues that are going
25 to trial in this case. One of the issues is Claim

1 Number 4 where they allege that the UDAQ failed to
2 determine that the ambient air within the Sevier Valley
3 Shed is in compliance with The Clean Area Act, and in
4 fact has no baseline data with which to make evaluation
5 additions requested by SPC. So this is an issue that's
6 going to trial. There is going to put evidence on, a
7 modeler is going to testify. We're going through the
8 process of how these clean air standards were arrived
9 at.

10 Another issue that is going to trial is Number 5
11 where it is alleged that UDAQ failed to model the air
12 flows and currents as they actually exist within the
13 enclosed Sevier Valley, but rather assumed uniformed
14 distribution of the emissions from the proposed SPC
15 plant.

16 Mr. Kennon, he brought up a concern that he has
17 about this uniform distribution, and that is an issue
18 that is going to be addressed at trial. There is going
19 to be testimony about modeling and so forth on that.

20 Another issue is whether dry back house filter
21 should be used as opposed to water scrubbers for the
22 Math (phonetic) Analysis. That's something where there
23 is a genuine issue of material fact whether there will
24 be pertinent testimony on that particular issue.

25 Another one is whether there was sufficient

1 analysis of the impacts on the power plant - on the
2 soil, vegetation, wildlife and animals. That's an
3 issue that's going to trial. So there are a lot of
4 important issues that are going to go to trial which
5 Sevier Citizens have raised, so we'll have that
6 opportunity and the board is going to hear that.

7 Another one is Claim 14 about down-wash modeling
8 needs to be reevaluated. That's an issue that is going
9 to be addressed. I think that's also -- there is a
10 difference of opinion there. It's something that
11 should go to trial and testimony should be heard.

12 I think that's all I really have to say. I think
13 our purpose in filing this motion was just make sure
14 that the claims which should go to trial are going to
15 go to trial and so we don't spend time needlessly in a
16 legal proceeding hearing testimony that is not going to
17 make a difference to the board.

18 MR. STEVENS: Just a couple of observations
19 and one comment about Claim Number 3 on IGCC. I think
20 everybody has been at a point in their life where they
21 see what a legal standard is, but they don't feel that
22 it is strong enough and they wish that it were
23 stronger, they would prefer that it be different.
24 That's what we're dealing with on these claims. It is
25 clear to us that Sevier County Citizens care very

1 deeply about the area where it lives, and that's
2 bumping up against what the legal standards are for the
3 permitting of a coal-fire power plant.

4 The Executive Secretary is charged with the
5 responsibility of following the air rules that are
6 promulgated by the board. The Executive Secretary is
7 following the board's rules. And at that point, we
8 have to resign ourselves, or at least acknowledge the
9 fact, that the Executive Secretary can't be held to a
10 higher standard than the one he's charged with, and
11 that's what we're dealing with with these claims.
12 Unfortunately, we wish the rules were stronger than
13 they are, but we can only put them into practice the
14 way they're written.

15 With respect to IGCC, no one has asked them what
16 their position is on IGCC. Well, as near as I can
17 tell, it is spelled out right in their request for
18 agency action and we take them for their word that they
19 mean what they say. And, at that point, the only
20 question -- The question that is at issue is whether
21 IGCC should be required at the initiation of the permit
22 process. What type of facility are you going to build?
23 That's not the question here. The question is, that I
24 think Mr. Jenkins pointed out very well is, when you
25 reach the stage of a process where you're determining a

1 control technology for a proposed facility, can you
2 then require a different type of facility, such as
3 ICGG, to be proposed as a control technology? Well, if
4 it is a different type of facility, why would you ever
5 build the first one along with the control technology
6 as just a separate one? You would simply go with the
7 other one. So Sevier County Citizens is reading the
8 rule backward. They're using a separate stage further
9 along in the process to propose what type of facility
10 you're supposed to build when the applicant is already
11 entitled to choose the type that they wish, and then
12 provide an appropriate control technology for it.

13 As far as interpretations, Mr. Cumiskey has said
14 there is interpretations of what this rule means.
15 Well, that is exactly why we're here. It is a question
16 of law. No one is disputing the allegation of fact
17 that the Executive Secretary didn't require
18 consideration of IGCC. Executive Secretary hasn't
19 denied that. There is no issue of fact. The only
20 question is what the regulation means, and that is a
21 legal interpretation and that is the purpose of this
22 particular proceeding.

23 MR. VERNATH: We have two items now in
24 front of us that we need to act on to define the scope
25 of the hearing.

1 MR. KENNON: Mr. Chairman, can we respond?

2 Or is it just tit for tat? What is the rule here?

3 MS. NEILSON: Well, everyone else has.

4 MR. VERNATH: Okay. Please come up.

5 MR. KENNON: For me, there is just a couple
6 of things over and above what has been said. For one
7 thing, Pacificorp just got through telling you that
8 their big beef, my words, is they don't want IGCC
9 forced upon them. They're not against it, mind you.
10 They don't want it forced. That's exactly how we feel
11 about CFB. Okay. We don't want it forced on us.
12 That's why we want it in a hearing. The arguments are
13 the same. It just depends on what side of the fence
14 you're on. And as much as they talk about it being the
15 law, it is not the law. BAC is in federal court, and
16 Mr. Page's letter is in federal court. And, as I told
17 you earlier, I could bring up other publications that
18 will say the opposite of what they've just told you,
19 and that is what a hearing is all about, for you to
20 judge which one should be which. And so that's why we
21 think that -- Just remember. We don't want CFB forced
22 on us, but Pacificorp doesn't want that forced on them.
23 And that's one of the things.

24 Dick?

25 MR. CUMINSKEY: I think I have one comment

1 left. Mr. Stevens says, specifically stated, that the
2 law should determine whether IGCC is something that
3 needs to be considered or not. We use the exact same
4 words. The way we read the law, it provides a
5 different interpretation than what he did, and that's
6 exactly why they should go to a hearing so that this
7 board here today can make the final determination of
8 what they feel is the best interpretation of the best
9 available control technology.

10 MR. KENNON: IGCC is not a new technology.
11 It is fairly old technology. What it is new, is new to
12 the electric generating industry. Refineries and other
13 people have used them before. I think I said it here.
14 China has ordered 12 the last I've heard and there is
15 lot and lots being built -- They're in the early stages
16 sure. They're probably just breaking ground, but the
17 reason that the electric industry doesn't use it is
18 because they don't want it. And so if they can keep it
19 out -- Like, I said, they'll do it when they want to.
20 That doesn't mean it is good or bad. It means they
21 don't want to do it unless they suggest it. Well, this
22 suggestion is coming from the citizens that buy their
23 electricity and have to rely on their electricity
24 coming in, and we want it.

25 As far as the laws go -- They talk about the law.

1 Just recently, and I have it in another binder here,
2 the present administration tried doing the same thing
3 Mr. Page has done with old coal-fired power plants and
4 that went to court, and within the last week, the
5 courts have said, "No, that's not the way you make
6 law." You have to go to public hearings and you have
7 to do this and you have to do that. One person in one
8 office in the EPA does not make the laws. They might
9 want to make you think that, but that's not the way it
10 is done. And I hate to say it, but I hope that two
11 years from now, or whenever this court case is
12 finalized, it will say, "Hey, remember two years ago,
13 we hold you and BAC is part of this court suit."

14 Sevier Citizens, we are not the only ones in this
15 nation that is saying this very same thing. It is
16 going on all over the country. You know, you might
17 think -- I would think they'd say, "Hey, are we crazy
18 or what," but we're not the only ones. This is going
19 on all over, and yeah there has been court challenges.
20 And as far as the number of IGCCs in the general
21 electric industry, that depends on which brochure you
22 read. You know, Europe was the first ones to use it.

23 And, like I say, the reason is that, in the laws,
24 there has been one state that I knew of that the judge
25 knocked down IGCC and that was because specifically the

1 way their state law was written, not the federal law.

2 But that will be decided soon. Okay. Thank you.

3 MR. SORENSON: Mr. Kennon, I have one
4 question for you before you leave. I would like to go
5 back and readdress the Executive Secretary's request to
6 dismiss the first submittal. I don't think we got a
7 clear answer on that as to whether or not your concerns
8 on the first request are indeed addressed in the
9 additional 14 items. Could you respond to that?

10 MR. KENNON: Our contention is as was set
11 in the second briefing is that they are one document.
12 It states that in the introduction is that they are not
13 to be considered separate but one document.

14 MR. SORENSON: Okay.

15 MR. KENNON: The other thing is, what is
16 going to be changed by doing this? I mean, what is
17 their intention? If I go out and I want to paint a
18 room to make it more colorful or something or brighter,
19 well, then I accomplish something. But what is the
20 sense of doing it? We don't see any sense in -- There
21 has to be some motivation behind it. What is their
22 motivation? It doesn't make any difference.

23 MR. SORENSON: From the perspective of a
24 board member, what I'm looking at is we have a very
25 broad issue we're trying to get our arms around, and if

1 we have redundancy within documentation that's not
2 going to be narrowed, I'm looking to understand is
3 there a value in doing that?

4 MR. KENNON: Maybe I'm dense when it comes
5 to that, but I don't see where there is -- One is more
6 or less an explanation of what the first one was. It
7 is just in more detail is what it was.

8 MR. SORENSON: Let me ask the question in a
9 different way. If the board grants the Executive
10 Secretary's request to eliminate that document, do you
11 feel that Sevier Citizens are in any way compromised
12 with the other 14 items that are being addressed?

13 MR. KENNON: I'll answer that very honestly
14 if I can. If I was not suspicious of what the motive
15 is, then I would not think they would be compromised.
16 But I think there is some motivation behind it;
17 whether they're fearful of a lawsuit later on and it is
18 brought into court or something like that or some other
19 motive, then maybe that's the motive. I don't know.
20 But they haven't offered any motive for it. I'm very
21 suspicious of why they would want to do that, because
22 it doesn't really -- It doesn't help the situation in,
23 not to me. Like I say, we're going by the points that
24 you're going to allow us, whatever you decide so really
25 it's a moot point, but I'm suspicious.

1 And, I have -- I can tell you, because I have a
2 witness right here, that there is things that have
3 happened over this period of time that -- People told
4 me things and then I came back and then they said,
5 "That's not what I said at all." And I don't want to
6 direct point any fingers, but I'm suspicious because
7 that's happened to me too much during this process.
8 "Oh, no. We're going to clarify the point," so I'm
9 suspicious that is what this is, that there is
10 something behind it, there is a reason for it. Why are
11 they concerned? I'm not concerned with if there is two
12 publications or whatever. They were intended to be one
13 for a certain reason, yes, because I knew I was going
14 up against attorneys and they make things sound
15 differently than maybe what I want it to sound like.
16 And so to cover ourselves -- And it was. That's
17 exactly what it was.

18 The way it came about, Mr. Sorenson, is because
19 I'm not an attorney and I didn't know what I was
20 doing. Okay. So when there was questions in this very
21 room about the first document. I just went back and
22 said, "Oh, there's questions. I'll answer them," you
23 know, not thinking about motions or briefs or going
24 before a judge. And that's how it actually came
25 about. There was no intention to doing anything other

1 than clarifying our first request. That was the
2 intent.

3 MR. NELSON: Mr. Kennon, can I propose a
4 resolution of this, because it seems to me in some ways
5 to be a non-issue, that if you agree that the 14
6 issues, or the issues that would potentially go to
7 hearing depending on what the board does today, that
8 there aren't some other issues out there that you're
9 going to raise that are at a later date by that initial
10 pleading, that the issues that you want to present to
11 the board are those 14 issues? And I think if on the
12 record we can agree to that, then I would ask is the
13 Executive Secretary okay with simply withdrawing their
14 motion to dismiss?

15 MR. STEVENS: Absolutely. That's the only
16 reason we filed the motion in the first place to make
17 sure there was nothing left over.

18 MR. NELSON: So, with that agreement, they
19 will withdraw their request --

20 MR. KENNON: Yes. I would have agreed to
21 that a long time ago.

22 MR. NELSON: Okay. That resolves one of
23 the issues.

24 MR. VERNATH: So the Executive Secretary's
25 motion has been withdrawn?

1 MR. NELSON: Yes, based on that --

2 MR. KENNON: Yes, we totally agree with
3 that. We're just plain folks, and we're not here to,
4 you know, throw a hook into something. You know, maybe
5 we do at times because we don't know any better, but we
6 have good faith coming in here and that's the extent of
7 it. As far as, like, lawsuits, you know, I think
8 that's a distinct possibility over this. I can tell
9 you right now. I'm not threatening you with a lawsuit,
10 but when we go to the Supreme Court -- and you were not
11 here -- but when one of the justices states during
12 IPP's hearing to Mr. Finlinson "Do you think Sevier
13 Citizens has a claim," and this was on health, and Mr.
14 Finlinson says, "Yeah, I think they could have a
15 claim." And when you get that kind of feedback from a
16 supreme court justice, it makes you think that if we
17 don't get heard on health, where else do we go?
18 Because it is serious.

19 You know, we have to live in a community where
20 people came there because they can't survive at other
21 places. So that's why it is such a big issue. If you
22 took all the people and transplanted some place else
23 with clean air and said --

24 MR. SPROTT: Mr. Chairman, can we proceed,
25 please?

1 MR. VERNATH: Yeah. I think we have now
2 the second item, and that is the executive motion to
3 dismiss the nine items. And, Mr. Nelson, you kind of
4 presented two options, and could you reiterate them for
5 us?

6 MR. NELSON: They've indicated that they
7 believe that there are nine of the issues of the 14
8 that no evidence needs to be further taken on those
9 issues. The board has the option of addressing those
10 now specifically issue by issue that will define the
11 scope of the hearing on May 10th. The board could also
12 defer making a decision on those until after the
13 hearing, but that would mean that the hearing would
14 include any kind of evidence that they wanted to try
15 and present on those issues. Those are your options.

16 MR. VERNATH: And I think that one of the
17 clarifications here with sources and discussions I've
18 had with Mr. Nelson, we have a limited window of time.
19 And if you presented -- I hope it will be adequate for
20 you to present your evidence. The more issues we have,
21 the more time the Executive Secretary is going to need
22 to address those issues, which means the less time we
23 can allocate to you to present your evidence on the
24 issues that we are hearing. So there is a tradeoff
25 there in this. The fewer issues, the more time you

1 will probably have because the Executive Secretary will
2 need less time. Is that correct?

3 So I guess we're ready proceed to discuss, have a
4 discussion, on the Executive Secretary's motion.

5 MS. NIELSON: Mr. Chairman, I guess, make
6 a couple of observations, and I would be particularly
7 interested in understanding the Sevier County Citizen's
8 perspective on this. And some of this is based on the
9 discussion I've heard today, and particularly an issue
10 Mr. Horrocks raised earlier. As I look at Number 6,
11 the Claim Number 6, which the Executive Secretary is
12 suggesting that we dismiss, at the same time the
13 Executive Secretary is recognizing that there may be
14 some factual issues tied to Claim 5, and there has been
15 a discussion that the issues you're raising in 6
16 regarding the distribution of emissions and the
17 adequacy of modeling of air flow that those might be
18 similar. So I guess my first question is whether the
19 issues in Claim 6 and Claim 5 might be addressed
20 together. And I understand when you prepared this, it
21 is sometimes hard to think through that in terms of the
22 way the rules work, but as I'm listening to your
23 discussion, it seems to me that five and six are
24 getting at somewhat the same issue. And so my question
25 would be whether combining those as one issue for

1 presentation to the board might make sense?

2 MR. KENNON: You notice, I look around, but
3 I've tried to run our organization on a very democratic
4 basis, and I do speak for as many people as I can, and
5 that's why I look around because I don't like making
6 the decision myself. But I would agree with you on
7 that point. Some of these things are awfully hard to
8 set aside. It isn't so clean, and they seem to kind of
9 run together.

10 MS. NIELSON: And I'm not proposing that
11 you set them aside. I guess I'm asking that whether we
12 could combine them so 5 and 6 could be addressed
13 together?

14 MR. KENNON: We could.

15 MS. NIELSON: And my question beyond that
16 is that I listened to the discussion on Claim Number 11
17 and there also seems to be some commonality in terms of
18 issues of uniformed distribution or concentrations of
19 emissions, and I'm wondering whether 11 could also be
20 combined with 5 and 6. And I'm not making this as a
21 motion. I'm just trying to understand whether those
22 are similar issues in 11 to issues that are raised in 5
23 and 6.

24 MR. CUMINSKEY: I'd answer for Mr. Kennon.
25 5 and 6 we consider very similar. Number 11 we

1 consider entirely different and separate.

2 MR. KENNON: 11 is really a big issue in
3 our area. We have members that live very very close
4 that are bedridden and they're very passionate about
5 it.

6 MR. NIELSON: And maybe you would like to
7 take that. I guess my observation here as we kind of
8 put this together as it seems to me that 5 and 6 could
9 be combined on the discussion that we've had. And I
10 think Mr. Horrocks has a question.

11 MR. HORROCKS: Yeah. I was wondering if
12 there might be a similar issue with Claim 9 and 10 if
13 they could be combined into one.

14 MR. KENNON: Yes. As a matter of fact,
15 they come from the same area. I wouldn't hesitate on
16 that. A lot of that does overlap. I've been trying to
17 contemplate, since we knew that there would be one day
18 and a limited amount of time, that maybe we would have
19 to make some decisions on what is most important to
20 us. And, you know, I still kind of throw that out to
21 you. You know, we might think that, "Well, let's take
22 an hour with this issue and let's take 15 minutes with
23 this other issue," because we know we're constrained
24 anyway, but some kind of thinking along that line, I
25 think, would also, by combining what you suggested and

1 maybe setting some priorities that -- I mean, I
2 understand you don't want to go down there and just go
3 on and on forever. And I've heard the attorneys speak
4 about people getting up and really it is not relevant,
5 and I understand that. And I sit there and listen to
6 our witness testimony and I say, "Gee, this really
7 doesn't matter." But, I want to tell you, to that
8 person, it matters a lot.

9 I think, thinking outloud again, you know, no
10 doubt under the circumstances we're going to have to
11 look at our witness list and say we're going to have to
12 make some decisions. Is this witness more important to
13 get this point across and so forth? We'll have to work
14 at that point of it if we want to get our best point
15 across. We don't want to waste our time either.

16 MR. HORROCKS: Mr. Chairman, I think, in
17 recognizing your understanding of the time constraints
18 that may be imposed on you to stay within a combined
19 hearing length, and that you recognize that you need to
20 make those priorities, I'd like to make a motion that
21 Executive Secretary's motion to dismiss Claim 2 be
22 approved based on your common agreement already, that
23 items 6 be covered under Claim Number 5, that Claim 10
24 be covered with Claim 9, and that the remaining claims
25 which are 1,3,7,11, 12 and 13 be deferred until

1 after -- that those Executives Secretary's motions for
2 judgment on the pleadings dated February 27, 2006 be
3 deferred until after the May hearing.

4 MR. VERNATH: Did we get that all down?
5 We'll repeat it carefully. I was taking notes too.

6 MR. GROVER: Well, actually we're not
7 granting the motion because they're doing it after the
8 hearing.

9 MR. HORROCKS: I think the intention of my
10 motion was to grant partial with the elimination of
11 Claim 2, 6 and 10 recognizing that 6 and 10 will be
12 included in -- 6 in 5, 10 in 9, and then deferring a
13 decision on the other items.

14 MR. GROVER: I guess I'm saying, I
15 understand the 2,6 and 10. The balance of the other
16 items, their motion is that we make a determination at
17 this point as to whether they have any basis in law of
18 proceeding. If we defer that, it is more or less just
19 denying in my opinion. You can't really defer a
20 dispositive motion until after the trial.

21 MR. HORROCKS: And I do believe that there
22 are a number of points that the Executive Secretary has
23 made that go to points of law that I'm not prepared at
24 this point and time to dismiss their motion entirely,
25 but I'm anxious for the Sevier County Citizens to have

1 their day in court and prepared to go down to Richfield
2 and hear whatever you have to say and whatever you have
3 to present before issuing a ruling.

4 MR. SORENSON: Jim, would you clarify, on
5 the items other than 5 and 9 or combining 5 and 10?
6 You mentioned defer until after the hearing; is that
7 correct?

8 MR. HORROCKS: Correct.

9 MR. SORENSON: So what you're proposing is
10 we would not hear the testimony on those items?

11 MR. HORROCKS: No. I am saying that we
12 would hear testimony on those items and we would make a
13 determination after the hearing whether or not to make
14 the ruling then after we hear what's presented at the
15 May hearing. Was that option two, Fred?

16 MR. NELSON: In response to the question of
17 Mr. Grover, the query, you can defer making a decision
18 on a question of law, allowing a party to see if there
19 is a question of fact. In other words, you allow them
20 to see if they can raise a question of fact. You may
21 ultimately decide, "No, this is a question of law.
22 What we have heard does not raise an issue of fact.
23 This is a question of law." And I think what the
24 motion is is that you simply defer making a decision on
25 those questions of law as argued. They're arguing

1 they're not questions of law. The Executive Secretary
2 is arguing they are. You just wait to make the
3 decision. That may mean the hearing will be longer
4 because they will have an opportunity to address those
5 and whether or not there are issues of fact.

6 But, questions of law don't have to be answered
7 at any particular stage of the hearing. They can
8 answered at any time.

9 MS. NIELSON: I think in support of that
10 motion, I think it does a couple of things. I think it
11 provides an opportunity for the Sevier County Citizens
12 to consider what they've heard today, to consider if
13 there are factual issues related to the claims where
14 the Executive Secretary has said that he believes it is
15 an issue of law, and as they decide what's important to
16 present, they can make decisions in terms of what they
17 bring forward or what they choose to argue before us
18 when we hold the hearing. And then, at the end, the
19 board still has the ability to say, "Based on having
20 deferred that decision, it is our determination now
21 that it really is a question of law." And it also
22 gives us the ability to say, "We're not going to decide
23 whether it is a question of law or not, but we will not
24 rule in favor of the Sevier County Citizens in terms of
25 that claim or we will rule in favor of them." So I

1 think it's an approach that provides the maximum
2 options in terms of both the citizen providing the
3 information. I think that the other parties can affirm
4 their statements as they choose, but it also leaves
5 maximum option for the board in trying to reach the
6 best decision, so I would second the motion.

7 MR. VERNATH: All right. And you two
8 check me on this. I think I've got a list here for the
9 minutes. It says, of 14 claims, Number 1, you would
10 defer; Number 2, we will grant the Executive
11 Secretary's motion to dismiss; 3, we defer; 4, we hear;
12 5, we hear and is merged with 6.

13 MS. NIELSON: Or the other way around.

14 MR. VERNATH: 6 and 5 are merged and heard;
15 7, we defer the Executive Secretary's motion; 8, we
16 hear; 8, and 9, are merged and will be heard; 11, will
17 be deferred; 12, will be deferred; 13 will be deferred;
18 and 14 will be deferred.

19 MR. NELSON: When you say, "Deferred," it
20 means that if they want to present issues that they
21 believe are questions of fact, they have the
22 opportunity to do that before you make the final
23 decision.

24 MR. VERNATH: Right. And we have the
25 option at that time to rule on whether it was a

1 question of law?

2 MR. NELSON: Yes.

3 MR. HORROCKS: I just want to clarify that
4 it was my intention in my motion, though, to grant the
5 Executive Secretary's request to dismiss 2, 6 and 10.
6 I believe that 6 can be combined with 5 so that Sevier
7 County Citizens can present their information, that 6
8 and 10 would be dismissed.

9 MR. VERNATH: Thank you for the
10 clarification.

11 MS. NIELSON: I think that may be the same
12 sort of clarification we arrived at a moment ago on the
13 first and second motions and that there may be some
14 procedural reasons why that's helpful.

15 MR. SORENSON: My only concern is that
16 we're giving Mr. Kennon and -- We have limited amount
17 of time, and I would like to ensure that we're giving
18 the parties involved clear enough direction that they
19 understand what we as a board are looking for and what
20 we are going to be making decisions on and that the
21 items that we're saying will be heard, we'll be looking
22 for presentation of the facts, and that the items that
23 are being deferred, unless there is substantial
24 evidence to say there is facts to be presented, the
25 position of the board at this point in time is we are

1 going to act on the law as it is written. We're going
2 to have limited amount of time, and I would like to
3 ensure that the testimony that is presented is truly
4 going to provide the board with the facts and testimony
5 to make decisions on the items that we really are
6 looking for, testimony on facts.

7 MR. KENNON: I hope we can do that.

8 MR. GROVER: Are we in discussion phase
9 or clarification?

10 MR. VERNATH: Yeah, we're discussing. We
11 have a motion seconded and I'm opening discussion.

12 MR. GROVER: Well, I have some problems. I
13 mean, I think the reality is, is we're supposed to be
14 -- The whole purpose of a dispositive motion is to
15 identify the issues of fact, taking statements of fact
16 and then they refute the statements of fact. If they
17 are unrefuted, which they presented their Statement of
18 Fact, the Executive Secretary, then there should be
19 sufficient -- If we can establish that, then we should
20 be able to provide the legal arguments. And there was
21 a few that were mushy, I agree, but some of these are
22 pretty straight forward to me, like approved sources or
23 non-approved sources. That seems pretty straight
24 forward as to what we need to consider under the law,
25 so that's I would not be in favor of this motion.

1 MS. NIELSON: Is there a substitute you
2 would find more acceptable?

3 MR. GROVER: No. I mean, basically, I
4 agree with the 2, 6, 10 combination. The other ones I
5 think are pretty straight forward and I would be
6 inclined to grant the Executive Secretary. There is a
7 motion before us, so it's not appropriate for me to
8 offer any alternative at this point.

9 MR. VERNATH: You can offer an amendment to
10 the motion.

11 MR. GROVER: Well, yeah. I'm not really
12 sure there is much I can do with --

13 MS. NIELSON: Could I just clarify though
14 your sense is that the other claims 1, 2, 3, 7 -- I'm
15 sorry -- 1, 3, 7, 11, 12 and 13 also should be granted
16 in terms of the dispositive motions?

17 MR. GROVER: Wait a minute. Yeah, correct.
18 So you do the combination and then you also would grant
19 their -- Instead of deferring them, it would be
20 granted. I don't see anything to be accomplished by a
21 deferral if the -- the facts, the legal -- No matter
22 what the fact situation is, the legal -- I mean, that's
23 the whole purpose of this motion is to determine what
24 the legal interpretation is and with undisputed facts
25 in advance so that we scope it into the things that are

1 fact specific. And maybe we don't all agree on
2 interpretation of the law, which is fine, and we don't
3 grant it. I mean, some of these are pretty straight
4 forward.

5 MR. VERNATH: From my standpoint, I know
6 how difficult this question of what is a question of
7 law and a question of fact. When I talk to attorneys,
8 they say, "Well, gee, that's a question you get on the
9 final examine on a law course." It's tricky. So I can
10 see that there has been confusion, but I think things
11 like Number 1, there are some potential questions of
12 fact that could be introduced. For example, there has
13 been all this graph modeling on the growth in the West
14 and so forth. Those are questions of fact that could
15 be presented if they should choose to show an example
16 that there is cumulative growth as to predict a
17 problem. That's the type of thing they could present.
18 And I think on several of these others as I made in my
19 notes today, there are things that could potentially be
20 questions of fact that they could choose to introduce,
21 especially in these cases where they say, "Well, there
22 is a memo from EPA that was not properly addressed due
23 to the public comment," then we have some questions of
24 fact; "Was that memo from the EPA properly considered
25 by the Executive Secretary?"

1 So I think a lot of these points that were made,
2 I don't know for sure, but I don't what they're going
3 to argue.

4 MR. GROVER: But that's the purpose for
5 having the response, that they're supposed to lay out
6 their statement of facts, they're supposed to dispute
7 the facts, and then provide an alternate of what they
8 intend to present. That's the whole purpose of doing
9 these. If you don't present it, then -- I guess,
10 that's what I'm struggling with is, is I don't think it
11 is our job. It's not my job. My job is to sit in the
12 judicial process, not to make a case for either side or
13 potentially promulgate arguments from either side.
14 That's each side's job to do. So that's why I'm a
15 little reticent to just extrapolate into what might
16 be. I have to go with what is presented by both of the
17 parties, or three, or the other parties.

18 MR. VERNATH: I think in fairness to the
19 public process and the right of the citizens to be
20 heard, if there was some legitimate confusion on the
21 part of Sevier Citizens of the time when those things
22 should have been presented in what format, I would be
23 inclined to give them the benefit of the doubt and
24 listen to the argument, and then decide. That's kind
25 of my position, that we should be as open and

1 transparent to comment as possible. That's why when I
2 look at somebody and (inaudible) and say, "No, you
3 can't ask that question."

4 MR. GROVER: I understand.

5 MR. VERNATH: Tell them that the power cord
6 is unplugged, you know, fine.

7 MR. GROVER: Again, I'm just trying to stay
8 within what I perceive my authority to be and my
9 authority not to be and follow the legal guidelines
10 that I think the law requires this board to follow
11 which I'm a member.

12 MS. BUNKER: I'm kind of going along with
13 what Jerry says. I'm concerned that we keep deferring
14 and putting things off. You know, we go so far, and
15 then we go so far. I would like to see us come up with
16 some date that we're going to decide this so that all
17 of the parties involved will have an opportunity to
18 know where this is going. This has hung on for quite a
19 while now, and I can see that if we defer some of these
20 things and we say that the hearing is the 10th and then
21 they're supposed to have their summaries in by the 20th
22 and then we talk about it in June and then we don't
23 decide and then it's into July, you know, essentially
24 just dragging it out. I would like to see us, if we're
25 going to defer some of these things, I would like to

1 have us say, "This is the date," you know, come up with
2 a date so that they all are aware of what we're doing
3 and where we're going.

4 MR. HORROCKS: Just to respond, I totally
5 support that, and I am very hopeful that that final
6 decision date will be the June board meeting.

7 MR. SORENSON: My concern is we're
8 confusing what Mr. Nelson presented to us as deferral.
9 As I understood what Mr. Nelson presented is, if we
10 choose to defer a particular item, we are deferring it
11 until after the hearing to make a legal determination,
12 and then there would be no testimony or hearing on that
13 item. So I think we're confusing words here. What I
14 would offer as a proposal is we take each item one by
15 one and we make a vote as to whether or not we support
16 Executive Secretary's motion on each particular item.
17 If we're in agreement as a board to accept Executive
18 Secretary's motion, the item is removed from the
19 hearing in May. If we're not in agreement, or we vote
20 to reject the proposal, the item is on the hearing in
21 May.

22 MR. VERNATH: Well, I think for procedural
23 reason, either Mr. Horrocks has to reprise his motion
24 or we have to vote on the motion we have.

25 MR. HORROCKS: I would like to have a vote

1 on the motion. Just a clarification for Mr. Nelson.
2 Is deferring the decision on the facts of law on the
3 motion until after the hearing, does that in fact mean
4 they cannot present information at the hearing?

5 MR. NELSON: No, if they believe there is a
6 contested issue of fact with respect to that issue they
7 can present it at the hearing.

8 MR. GROVER: Essentially, it is almost the
9 same as denying basically and waiting. I don't see the
10 distinction there. Because if it was denied, we would
11 be hearing it at all and making the determination under
12 the rule of law, am I correct, at that point in time?

13 MR. NELSON: What you're raising is a
14 question of should we hold Sevier Citizens to having to
15 have already presented those questions of fact at this
16 point in time, or are you going to give them more time
17 to do that in response to Executive Secretary's motion?
18 That's the issue.

19 MR. HORROCKS: And I believe that that's
20 why I -- I think under normal circumstances, if we had
21 citizens group here representing an issue and they were
22 represented by legal counsel, I think I would be
23 inclined to hold them to a higher standard in regards
24 to they had their chance to respond to the Executive
25 Secretary's motion. In this particular case, I'm

1 willing to give them a little more time and that time
2 being the May hearing.

3 MR. GROVER: Okay. I guess, I'll call the
4 question.

5 MR. VERNATH: Okay. So all in favor of Mr.
6 Horrock's motion which we have on paper, all in favor,
7 "I."

8 MR. SORENSON: Can I ask you to repeat it
9 first? We've gone around so often I'm not sure any of
10 us really understand what the motion is.

11 MR. VERNATH: We've gone over the
12 clarification of what defer means, that they can
13 present questions of fact. We're deferring making
14 decisions on questions of law. Item 1 would be
15 deferred, item 2 would be granted, item 3 would be
16 deferred, item 4 would be heard, item 5 would be
17 heard -- and because if item 6 will be merged with
18 that -- item six will specifically the Executive
19 Secretary's motion would be granted -- item 7 would be
20 deferred, item 8 would be heard, item 9 would be heard
21 and it would include the arguments of 10, item 10 would
22 be granted, 11 would be deferred, 12 would be deferred,
23 13 would be deferred, and 14 would be heard.

24 The question has been called. All in favor of
25 the motion? All opposed?

1 The motion carries then.

2 MR. SPROTT: Mr. Chairman, what was the
3 count again? I mean, who voted for and against?

4 MR. GROVER: I was the only one that voted
5 against it.

6 MR. VERNATH: Okay. Let's do a recount
7 here. Raise your hands. All in favor? And opposed?
8 Okay, one.

9 All right. At this point in time, we have
10 defined, I think, the issues that will be heard. Are
11 you saying you need a side-bar conversation? If people
12 need a side-bar conversation, we will give you a little
13 time for that before Mr. Nelson helps set a schedule.

14 MR. SPROTT: Mr. Chairman, I'm quite
15 frankly not clear. I know we've attempted to clarify
16 it, but I'm not clear exactly what will be heard at the
17 May 10th hearing. I'm not clear on this deferment and
18 so forth. Because it sounds to me, in effect, the
19 deferment has the effect in terms of a hearing and the
20 quantity of testimony and so forth of being denied. In
21 other words, 2 is approved and couple of others we
22 combined, basically issues of fact and so forth and
23 testimony will be full blown as if they were being
24 heard without even these dispositive motions being set.
25 Is that correct?

1 MR. NELSON: I don't understand your
2 question.

3 MR. NELSON: I thought we just had a
4 discussion and Mr. Grover took one position and the
5 board took another.

6 MR. SPROTT: I'm just trying to understand
7 what our charge will be. I mean, I want it on the
8 record, what specifically will happen at the hearing,
9 because as a practical matter, we've been here about
10 four and a half hours today, and I'm not we have a
11 one-day hearing here. So that or may or may not have
12 any affect on your decision. I'm not suggesting you
13 change your decision, but it does have an impact on the
14 next phase which you're about to get into, Mr.
15 Chairman.

16 MS. NIELSON: Let me see if I can explain
17 what I think is the question and the answer. The
18 question is: What should the parties actually be
19 prepared to address to talk about during that hearing,
20 whatever period and time the hearing takes?

21 MR. SPROTT: Yes, that's correct.

22 MS. NIELSON: And my understanding of what
23 we have just voted is that on Claim 1, if there is an
24 issue of fact that the Sevier County Citizens want to
25 raise with us on that issue, May 10th, would be the

1 time to do it. If not, that's fine also. That doesn't
2 count against them. And the board will then, after May
3 10th, decide whether to grant the Executive Secretary's
4 dispositive motion that that is an issue of law, not an
5 issue of fact. On 2, nobody is going to talk about it
6 on the 10th. On 3, it would be the same thing. If
7 there were factual issues that Sevier County Citizens
8 wanted to raise, then we would hear those, but,
9 otherwise, the board would make a determination
10 regarding the Executive Secretary's motion. On Number
11 6, we're not going to hear 6 per say as it's written in
12 this claim here because we've got some agreements that
13 the concerns that were raised in 6 can be adequately
14 addressed within Claim 5, and we are going to have a
15 discussion in Claim 5 and everybody is going to
16 participate.

17 MR. NELSON: 6 is dismissed.

18 MR. NELSON: But 6 is dismissed. So 2, 6
19 and 10 are dismissed, 6 and 10 are included other
20 motions. 6 is included in 5, 10 is included in 9. If
21 the Sevier County Citizens decided that they wanted to
22 present factual issues on claim Number 1, then all the
23 parties would be able to address this, but if the
24 Sevier County Citizens didn't decide that they had a
25 factual issue they wanted to raise with 1, then I don't

1 anticipate we're going to talk about it at the hearing
2 and we will make a determination afterwards as part of
3 the final decision whether or not to grant the
4 Executive Secretary's motion.

5 MR. VERNATH: And, furthermore, I would say
6 that today we have heard the arguments on the question
7 of law regarding these points, so that doesn't have to
8 be reargued at the hearing. We deferred it and it is
9 on the record.

10 MS. NIELSON: And the documents we
11 received, it's on the record and I wouldn't expect to
12 have more of an argument on the issue of law on 1, 3,
13 7, 11, 12 or 13.

14 MR. GROVER: You've got to have the facts
15 first to apply the law.

16 MR. VERNATH: If they start arguing
17 something that we as a board, as a judge, is a question
18 of law, we could rule that out of order and say, "Go
19 onto the next topic."

20 If they bring up facts regarding these items, the
21 Executive Secretary would have a right to rebut those
22 facts.

23 MR. SPROTT: And that's exactly the
24 question I had. Thank you very much.

25 MS. NIELSON: Is that what everybody else

1 understands?

2 MR. VERNATH: Yes. Okay. Let's kind of
3 get things reorganized. We'll let the parties who are
4 speaking come up to that table.

5 MR. FINLINSON: Well, the process you're
6 talking about may work, but on the other hand, by the
7 time an individual says they get through talking on one
8 said, "This was factual," it may really have been just
9 discussing the law, but you almost said to the rest of
10 us you don't have the chance to come back in. So in
11 kind of the fairness issue is if somebody gets a shot a
12 second shot, then the other party ought to be able to
13 have their corresponding shot. Now, that's part of the
14 difficulty in the trial preparation. We would have to
15 prepare knowing that we would have to deal with all of
16 the issues again except the three you're throwing out.
17 And that's the risk that you put us up against.

18 MR. HORROCKS: As long as we maintain
19 control of the hearing and prevent it from
20 deteriorating into arguments of legal interpretation
21 only, only presentation of facts, then we don't fall
22 into that quagmire of then everybody having an equal
23 opportunity to respond to legal arguments.

24 MR. FINLINSON: Well, I hope you're really
25 that good.

1 MR. HORROCKS: I hope Mr. Nelson is that
2 good to keep us --

3 MR. FINLINSON: That's just my concern, and
4 generally --

5 MR. NELSON: You will have an opportunity
6 to rebut whatever is presented, and if that means it
7 has to be deferred to another time because you don't
8 believe you've had an adequate chance to look at it, we
9 will deal with that.

10 MR. FINLINSON: I would really like to do
11 anything I could to prevent you from ruling sooner.
12 But if you believe that, I've got a lot of ocean-front
13 property in Utah County I'd like to sell you too. But
14 that's a concern that I have to.

15 MR. SORENSON: I think what I'm hearing Mr.
16 Nelson identify is that, in a normal hearing, you would
17 know specifically which points were going to be
18 presented and addressed and both sides, or all sides
19 involved, would have the opportunity to prepare their
20 case around those topics. What we have done
21 unintentive consequences is we've put three wild cards
22 out there, that Sevier County Citizens have the
23 opportunity to present or not present, and the other
24 parties will not know until they show up on that day
25 whether they're going to be presented. And in fairness

1 to all parties, I don't think we're doing justice to
2 everybody here.

3 MR. FINLINSON: Now, when Fred suggested to
4 you that the courts give you the option of -- on the
5 dispositive motions, they can say, "I'll take that
6 matter under advisement, but I think you ought to put
7 your case on, and at the end, I may rule as a matter of
8 law," but when they say that, it is premised on the
9 full opportunity to put your case on. And hopefully
10 we've done that, and hopefully, you know where you're
11 going, but we don't know what it is. And so we're a
12 little bit at risk of knowing what exactly it is you're
13 going to be looking at on that particular day.

14 MR. VERNATH: There are several points you
15 will be able to raise at the hearing. One is if they
16 start arguing questions of law, you can object to that.
17 If start bringing up something they didn't provide in a
18 timely fashion during discovery, you can bring that up.
19 So you do have some recourse.

20 MR. FINLINSON: Well, I can assure you,
21 everything we bring up will be a question of fact, and
22 so will everybody else.

23 MR. NELSON: As you well know, a judgment
24 on the pleadings are not frequently granted by the
25 courts because, Number 1, they're reversed most of the

1 time because somebody can always raise an issue of fact
2 some how some way. So, in part, what I understand the
3 board's decision was is that they are prepared to hear
4 the issue because there is the potential for other
5 coming issues that were not specifically ruled upon to
6 allow that opportunity. What that means is you have to
7 be prepared on each one of those issues. The other
8 option is just to deny the judgment on the pleadings
9 because there is a potential factual issue that you
10 know you will have to be prepared for.

11 MR. FINLINSON: I know. Well, the net
12 effect is, or the way the motion is, we've got to be
13 prepared to wrestle on everything you didn't throw out.

14 MR. NELSON: Yes.

15 MR. VERNATH: Let's take Mr. Jenkins next
16 and then Christian Stevens.

17 MR. JENKINS: Pacificorp really doesn't
18 have any issue with any of this except in one regard
19 and that was within something you said Commissioner
20 Vernath about that we won't reargue questions of law
21 after this hearing. My concern is this. Pacificorp as
22 an Amicus party does not have an opportunity to present
23 evidence and we're fine with that, but my problem is
24 that if others present evidence that are different from
25 the facts that have been presented so far, we really

1 ought to have an opportunity to your argue the law, or
2 the application of the law to those facts that's
3 presented. And the way that you've set forth this
4 hearing, we won't have that opportunity again, and I
5 don't think that was the intent for us in our Amicus
6 status on the question of Claim Number 3.

7 MR. NELSON: I don't think the board has
8 concluded the won't hear further argument on an issue.
9 I think Mr. Vernath's point was that he didn't want to
10 hear repetitive arguments, things that have already
11 been presented today.

12 MR. JENKINS: And we're okay with that. As
13 long as to board can set a time on Claim Number 3 if
14 new facts are presented that we have an opportunity to
15 argue how the law applies to those facts, then
16 Pacificorp is fine with that.

17 MR. HORROCKS: Maybe I'm getting this out
18 of order, Mr. Chairman. It addresses this question as
19 being raised as to whether a ruling is going to be made
20 at the conclusion of the hearing on May 10th or whether
21 or not that we will allow ten days for additional
22 responses to be submitted. And if we go with that
23 approach, that would give the Amicus status an
24 opportunity to respond within that ten days; is that
25 correct?

1 MR. VERNATH: I think that's probably the
2 next business item we need to address. (Inaudible
3 comment.)

4 I think Mr. Stevens had a point he wanted to
5 make.

6 MR. STEVENS: I wish I had more confidence
7 that this will be as straight forward a process as we
8 hope it will. I think it is going to give the board
9 and parties quite a workout trying to keep arguments
10 related to factual issues only as opposed legal issues.
11 And if I can use Issue 3 as an example, the only
12 factual issue that's really been raised there is
13 whether the Executive Secretary required consideration
14 of IGCC. The IGCC has admitted that he did not. The
15 only question now for Sevier County Citizens is the
16 witness that they plan to propose to testify to that
17 issue, is that witness going to say that the Executive
18 Secretary did consider it? That's an undisputed fact.
19 The only job the board has left -- and I'm using this
20 one as an example -- is it true whether this was
21 required? I see this as being a far more complicated
22 way of addressing these issues than is necessary, and I
23 have very little confidence, quite frankly, that this
24 going to be able to be done in one day and that the
25 parties and the board are going to be able to keep

1 control of it.

2 MR. VERNATH: Thank you. I think since
3 this is coming up (inaudible comment.)

4 Let's next discuss whether we will make a
5 judgement on the 10th or allow post-hearing briefs and
6 make decisions on the -- at the June meeting.

7 MR. NELSON: There is two ways that this
8 process can happen. The first is for the board to have
9 a hearing. And depending on which way gives you time,
10 either up front, or on the end of the process, but the
11 first way is the board will hear the matter, hear all
12 the testimony, and then allow ten-day period for all
13 the parties to file post-hearing brief. And the
14 post-hearing brief would be their summary of how they
15 think the board should decide based on the hearing. At
16 that point, they would also prepare proposed findings
17 and conclusions. The citizen's group theirs, the
18 Executive Secretary can prepare theirs, Sevier Power
19 could prepare theirs, present those to the board, and
20 the board makes a decision at the June meeting.

21 The other option is more work for me, but I'm
22 fine to do it, and that is that the board decides the
23 issues at the end of the May 10th hearing, and then I
24 draft the findings and conclusions based on what the
25 board decides and presents those to you at the June

1 meeting for approval. In any event, the June meeting
2 would be the date for the final decision, because it
3 has to be in writing and it has to be issued. So it is
4 up to the board as to how they want to handle it.

5 If you allow for a post-hearing brief, obviously
6 you don't then have to have closing arguments until the
7 June meeting and you don't have the time that it would
8 take the board to rule on the issues and discuss the
9 issues. On the other hand, it delays the decision
10 until the June meeting as to the parties knowing what
11 the decision of the board is.

12 MR. VERNATH: The that probably would
13 actually then be July by the time we had the
14 dispositive edited and findings --

15 MR. NELSON: If proposals were presented in
16 the June meeting, the board can look at the language
17 and decide which language they would agree.

18 MR. VERNATH: So we would have a decision
19 in June.

20 MR. HORROCKS: I'm not going to make a
21 motion, but I wanted to point out that in regards to
22 when we talk about developing an unwieldy process
23 here that could get out of hand in terms of our ability
24 to keep this within a one-day hearing, it is my
25 understanding that Sevier County Citizens recognize the

1 limitation of the time that there is going to be made
2 on May 10th, and you're going to constrain yourself and
3 limit your presentation to stay within that time
4 constraint.

5 MR. NELSON: Let me add an additional
6 comment on that. As far as the procedure, the
7 Executive Secretary will go first because the Executive
8 Secretary issued the approval order, issued the permit,
9 and needs to give the basis and background for that.

10 My suggestion is that the board allocates some
11 specific amounts of time. If, in fact, you want to
12 hold it to a one-day hearing, or try to hold it to a
13 one-day hearing, you need to allocate a certain amount
14 of time to the Executive Secretary and Sevier Power to
15 present whatever they want to initially, and then
16 identify a block of time for response to that and then
17 an amount of time for rebuttal. Otherwise, I think
18 you're looking at four-or five-day hearing.

19 MR. VERNATH: You know, as Rick pointed out
20 to me, there was a power plant hearing in Kentucky that
21 went, what, 74 hours. On some of the enforcement
22 hearings, the one I was an (inaudible) officer on, was
23 two days of court-reporter testimony in front of the
24 hearing officer and then a lengthy board meeting, so we
25 have to give enough time to deal with the issues

1 properly.

2 Do you want to discuss that now, or what it will
3 look like?

4 MR. NELSON: Well, usually, in a hearing,
5 an opening statement would take about 15 minutes a side
6 at the most, and maybe they can do it in -- but it is
7 kind of a summary of what they're going to present.
8 And, at that point, depending upon whether the board
9 wants to decide at the end of the meeting, you have a
10 certain amount of time left. You've either got six and
11 a half hours --

12 MR. HORROCKS: Maybe to help lay out this
13 timeline, maybe we ought to take kind of a straw pole
14 on that issue right now so you'll know how much time
15 you're trying to divide up.

16 MR. VERNATH: Without a motion, just as a
17 sense of the board, how many would feel that we would
18 need to make a decision within the time frame of the
19 May 10th meeting?

20 MR. SORENSON: I think you need to because
21 the body of the board at that meeting may or may not be
22 the same as the body of the next meeting.

23 MR. GROVER: You better allocate some time
24 discussion on that. That's part of --

25 MS. NIELSON: The agreement would have to

1 be that at whatever time to we decided to make a
2 decision that all of the board members who had been at
3 the May 10th hearing would be available to participate
4 in that discussion. That could be here in person or
5 wherever we are, in person, or participate by phone.
6 But the members who heard the information on the 10th
7 would be the members that need to be part of decision.

8 MR. NELSON: You raise a very good point;
9 and that is, whoever hears it has to be the one who
10 makes the decision. Whether you do that at the same
11 meeting, or a separate meeting, you still have to be
12 there. If a board member is not present, they can read
13 the entire transcript and then participate, but that
14 would mean reading seven or eight hours of transcript,
15 but, otherwise, they can't participate.

16 MR. VERNATH: And that's what we did at the
17 enforcement hearings is we had a hearing officer hear
18 it, and the transcript was presented to the board.

19 MR. SORENSON: I think the other important fact
20 is the element of time when trying to make a decision
21 while the facts are fresh in the mind whether than
22 waiting 30 days later. It is a round about way of
23 saying I think we should make it on the 10th.

24 MS. BUNKER: If that's a motion, I second
25 it.

1 MR. VERNATH: We'll go down and -- What's
2 your sense?

3 MR. HORROCKS: I guess my sense is to give
4 all parties that additional ten days to formalize their
5 thoughts in writing and respond, and, also, it gives
6 Pacificorp and -- Who else is Amicus? But I don't have
7 strong feelings. If the majority wants to do what is
8 necessary to make a decision on that day, that's fine
9 with me too.

10 MR. GROVER: That's kind of why I voted
11 against it. I think the process is -- It's like
12 presuming I'm going to know all the facts now so I can
13 tell you when the decision ought to be made. I presume
14 that we should be able to make some decisions on that
15 day on certain of the claims I would think. I'm not
16 going to be available any other days. That day is all
17 I've got for hearing.

18 MR. VERNATH: Assuming that, let's see what
19 the implications would be we. So, Fred, would we have
20 to allow time at the end for our own discussion, making
21 motions, and so we would need time for board action?

22 MR. NELSON: You would need time for
23 closing argument at the end of 15 minutes at a minimum
24 I would think per party.

25 MR. NELSON: And, if it's helpful,

1 Pacificorp would be happy to make it's argument at that
2 point in time on the one issue given the new facts that
3 may be introduced. That way preserve our right to
4 participate in the limited way the board has said that
5 we could, so that's just a suggestion for you to
6 consider.

7 MR. VERNATH: As a party, how much time is
8 Sevier Power going to need to present witnesses and
9 evidence?

10 MR. FINLINSON: Our initial thing, with our
11 witness -- and this is the difference between what
12 we've been doing so far and down there, is it will be a
13 hearing, so we will have a witness. We have one
14 witness. He is our consultant, the individual that
15 helped draft the complaint. So he's going to be our
16 main thing. We think we can probably get that done in
17 done in probably 30 minutes.

18 MR. VERNATH: Do you have a feeling of how
19 much time?

20 MR. MCCONKIE: Well, I've shown that I'm
21 not very good at estimating time, but I think that we
22 could present our case in two hours and then reserve
23 one hour for rebuttal.

24 MR. VERNATH: Well, right now that adds up
25 to --

1 MR. MCCONKIE: Well, that would be three,
2 so two hours of direct testimony and then one hour of
3 rebuttal.

4 THE COURT REPORTER: Is this on the record?

5 MR. FINLINSON: You might as well turn that
6 off. No, you can go off.

7

8 (Whereupon, a discussion was held off the record.)

9

10 MR. VERNATH: We are doing the prehearing
11 conference to resolve allocation of time for the
12 hearing day on the 10th.

13 MR. FINLINSON: Where is the hearing going
14 to be held at?

15 MR. SPROTT: It's going to be at Snow
16 College.

17 MS. NIELSON: The Richfield Campus, and
18 it's in Richfield, rooms 147 A, B, D and E.

19 MR. SPROTT: We were planning on sending
20 the details of that once the board decided on some
21 times and things like that.

22 MR. VERNATH: I'll try to recap our
23 discussion, and if I have said something wrong, please
24 raise your hand.

25 So we have tentatively decided the hearing will

1 start at 8:00 in the morning and we'll allocate out
2 nine hours of time which would take us to 6:00 p.m.
3 including a lunch and two 15-minute breaks. And the
4 board members will attempt free their schedules so if
5 overrun we could possibly go later, but being aware
6 that a few board members need to return to the Wasatch
7 Front on the night of the 10th so we can't go
8 ridiculously late.

9 We've talked about 20 minutes opening arguments
10 for both sides, or 20 minutes opening argument for
11 Sevier Citizens and 20 minutes combined for Executive
12 Secretary and Sevier Power. And then we've talked
13 about two and a half hours for witnesses, and an hour
14 for cross-examination for a combined total of three and
15 a half hours for Sevier Citizens and three and a half
16 hours combined for Sevier Power and Executive
17 Secretary. We then have 20 minutes for each side for
18 -- No, we don't need closing-

19 MR. NELSON: Well, it depends on what the
20 board does. That decision hadn't been made.

21 MR. VERNATH: So I guess the first act or
22 item for the floor call will be to resolve whether we
23 are going to defer any decision on that day.

24 Since we didn't have that on the record, that Mr.
25 Nelson will prepare a draft of this as an email to the

1 board members for a phone call to make sure we have
2 consent of the board members attending as far as the
3 ground rules for a schedule to the hearing.

4 So we're close now to allocations. Are each of
5 the parties -- and I think you said Pacificorp needed
6 15 minutes.

7 MR. JENKINS: Ten minutes would be fine.

8 MR. VERNATH: Sevier Citizens, is that
9 reasonable and fair to you?

10 MR. KENNON: I guess it will be. I
11 understand what you're saying. I really would like to
12 see it in writing before I commit myself. That's what
13 the hesitation, is but tentatively we will agree to
14 that. So someone will send out a copy of this schedule
15 as soon as possible?

16 MR. NELSON: Yes.

17 MR. VERNATH: Mr. Finlinson.

18 MR. FINLINSON: We're in agreement with the
19 concepts you've talked about. We probably encourage
20 you to maintain the flexibility to not try to make that
21 decision down that there that day, because, I think, if
22 you try to do that, you're going to cramp everybody in
23 terms of the witness and cross-examination. So I think
24 as Dianne has suggested, it makes some sense to roll
25 back and have some sort of process later and maybe

1 resolve. Hopefully, you could still do the hearing on
2 May 10th and then finalize where you are on June, you
3 know, at the next board meeting. But, you're going to
4 get really cramped trying to get all the hearing in and
5 then try to figure out where you want to go in that
6 same day.

7 MR. STEVENS: No comment there. I think my
8 client is sitting right up here, so I think that is
9 something we can live with.

10 MR. VERNATH: And Pacificorp.

11 MR. JENKINS: We're fine.

12 MS. NIELSON: Can I just clarify? As I'm
13 listening to you, that adds up to 7 hours and 50
14 minutes, am I correct, if you add in lunch and breaks?

15 MR. VERNATH: Yes.

16 MR. NEILSON: So that gives us roughly an
17 hour of time there that if we got into a bind.

18 MR. NELSON: You're assuming no closing.

19 MS. NIELSON: I'm assuming if there were
20 closing.

21 MR. NELSON: Then you would have an hour.

22 MS. NIELSON: We would have an hour. And
23 then if there is closing, then we would have roughly 30
24 or 40 minutes of additional time we could allocate
25 through the day.

1 MR. NELSON: Right.

2 MR. FINLINSON: If you got time, it might
3 be good to have a closing shot orally from the parties
4 as a summary of their position. And I think it is kind
5 of appropriate, because Utah Power, if you don't have
6 that closing there, they don't have that opportunity to
7 address the board at the hearing.

8 MR. NELSON: They would have the
9 opportunity to submit something in writing and present
10 something whenever the board decides.

11 MR. FINLINSON: Yeah, if you wanted to do
12 the next one, but you could eliminate a staff if you
13 had our closing arguments and then we submitted just a
14 written proposal, and at the next decision when you
15 met, you would be selecting and you wouldn't
16 necessarily have to hear that.

17 MR. HORROCKS: I like that idea.

18 MS. NIELSON: Actually, I do also. So that
19 would be if we do closing arguments on the 10th, there
20 would be briefs filed and responses filed, but there
21 would be no other arguments.

22 MR. NELSON: You wouldn't accept a
23 response.

24 MS. NIELSON: You wouldn't. You would just
25 do briefs.

1 MR. NELSON: Just a summary of the post
2 hearing brief and what they propose as the findings.

3 MS. NIELSON: But then we would not take
4 any other presentations?

5 MR. HORROCKS: At the June meeting, we
6 would not take --

7 MR. NELSON: You would just deliberate.

8 MR. VERNATH: A couple of other points, I
9 guess, that have been presented to the board, and I
10 would like to say that we'll try to keep the hearing
11 focused on the questions of fact, and if the board will
12 tend to rule on (inaudible) or if testimony starts
13 going off into issues other than -- other than our
14 subject of the hearing, and so we want to keep it
15 focused. We want people to stay within the time
16 limits.

17 And for the benefit of Sevier Citizens, I need to
18 reiterate the board's authority. The only relief we
19 can give is if we determine the rules as they exist
20 were not properly followed. So that's what you need to
21 focus your testimony on. Having someone come up and
22 say, "I've got asthma and the power plant is going to
23 make it worse" I'm going to be very sympathetic,
24 because my wife has got asthma too, but that isn't
25 something that the board can take action on. So you

1 need to focus, the witness time, the time you have, on
2 the questions where the board has authority to take
3 action and that your testimony would persuade us to
4 take action.

5 MS. NIELSON: And then can we ask the
6 Executive Secretary to find a time that we can hold a
7 conference call? Don't we need to agree on this?

8 MR. NELSON: Yes, because I think some of
9 the board members that left thought we were, the board,
10 was going to propose to make a decision. And I will
11 describe this in just a short memo, this discussion,
12 and indicate that the remaining board members wanted
13 that presented for the consideration on a phone call.

14 MS. NIELSON: That also permits a time for
15 board members who weren't here today to be able to
16 weigh in. Those board members who are going to
17 participate in the hearing, I believe, need to read the
18 transcript.

19 MR. VERNATH: (Inaudible comment.) I think
20 if we have a forum with the board members on the call,
21 then that would become a meeting and we would have to
22 have --

23 MS. NIELSON: It has to be noticed.

24 MR. VERNATH: This meeting will have to be
25 open to the public and I can come down here to moderate

1 from the --

2 MR. NELSON: We need to give an opportunity
3 to --

4 MS. NIELSON: There will be a call-in
5 number when we do this. We send a normal notice, there
6 is an opportunity for parties to call in or to come to
7 the place where the speaker phones are, and we would
8 have to have an agenda and have to indicate --

9 MR. VERNATH: So, in accordance with our
10 rules, we will be holding a telephone meeting with the
11 board at some time between now and May 10th.

12 MR. FINLINSON: Yeah. Dick and James,
13 since that may not be worth a trip up here, we'll set
14 that up, like Dianne said, where there is a call-in,
15 like an 800 number, so you all can individually, or as
16 a group from a home, or some place, call in and
17 participate on the phone just like all the other board
18 members are.

19 MS. NIELSON: Let me clarify. We're not
20 asking you to specifically be prepared to present
21 something that day. The objective of that call, as I
22 understand it, is for the board to agree on the
23 schedule and whether or not we're going to make a
24 decision, and, if we aren't, what the schedule will be
25 beyond that in terms of making a decision. So, there

1 will be opportunities for everybody, but we'll not
2 asking anybody to come prepared to present anything on
3 that.

4 MR. HORROCKS: Does that in fact need to be
5 a board decision, or could that actually be a directive
6 from the chairman to dictate what that is going to be?

7 MR. NELSON: There was a motion --
8 (multiple speakers at once.)

9 MR. VERNATH: Fred Nelson will also prepare
10 for the chair of the hearing in an opening statement
11 that just goes through some legalities and I've asked
12 him to make sure that that statement reiterates which
13 issues are in order for the hearing and which ones have
14 already been ruled on. So we'll read that into the
15 record right at the start of the hearing. That will
16 probably only take like five minute and then we'll
17 begin the hearing.

18 I think that's it. Meeting adjourned.

19 (Hearing ended at approximately 6:30 p.m.)
20
21
22
23
24
25

1 CERTIFICATE

2

3 STATE OF UTAH

4 SALT LAKE COUNTY

5

6 I hereby certify that the above and foregoing
7 proceedings were taken down by me in stenotype and the
8 questions and answers thereto were transcribed by means
9 of computer-aided transcription, and that the foregoing
10 represents a true and correct transcript of the
11 testimony given by said witness upon said hearing.

12 I further certify that I am neither of
13 counsel, nor of kin to the parties to the action, nor
14 am I in anywise interested in the result of said cause.

15

16

17

18 JASON COHRAN

19

20

21

22

23

24

25

